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IN THE

Supreme Court of the United States

PALMYRA PACIFIC SEAFOODS, L.L.C.; PALMYRA PACIFIC ENTERPRISES, L.L.C., PPE LIMITED PARTNERSHIP; AND FRANK SORBA,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are private contracts property protected by the Takings Clause of the Fifth Amendment to the Constitution?

2. Assuming that private contracts are property protected by the Takings Clause, is the federal government liable for regulatory as well as appropriative takings of private contracts?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The named Petitioners and the Respondent were the only parties to the proceedings in the Court of Federal Claims and the Court of Appeals for the Federal Circuit in this action. As explained below, there is no publicly held company that owns 10% or more of any of Petitioner's stock.

Petitioner Palmyra Pacific Seafoods, L.L.C., is a closely held private entity; the only corporate entity that owns more than 10% of the firm's equity is Petitioner PPE Limited Partnership. Petitioner PPE Limited Partnership is also a closely held private entity; Petitioner Palmyra Pacific Enterprises, L.L.C. is the general partner and no other corporate entity owns more than 10% of the firm's equity. Petitioner Palmyra Pacific Enterprises, L.L.C. is also a closely held private entity; no corporate entity owns more than 10% of the firm's equity. Petitioner Frank Sorba is a natural person who holds equity in Petitioners Palmyra Pacific Seafoods, L.L.C., PPE Limited Partnership, and Palmyra Pacific Enterprises, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Palmyra Pacific Seafoods, L.L.C.; Palmyra Pacific Enterprises, L.L.C.; PPE Limited Partnership; and Frank Sorba (collectively, "PPS") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit's opinion (App. 1a-22a) is reported at 561 F.3d 1361 (Fed. Cir. 2009). The underlying opinion of the Court of Federal Claims (App. 23a-46a) is reported at 80 Fed. Cl. 228 (2008).

JURISDICTION

The court of appeals entered its judgment April 9, 2009, App. 1a, and denied a timely petition for panel and *en banc* rehearing on September 29, 2009. App. 47a-48a. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2008).

STATEMENT

This case arises under the Takings Clause of the Fifth Amendment to the Constitution. While the property interest at issue here is a private contract, the case involves a unique piece of U.S. land — a remote Pacific atoll called Palmyra — that has been the subject of this Court's attention before. *See United States v. Fullard-Leo*, 331 U.S. 256 (1947) (holding in quiet-title action that a private party rather than the U.S. government held fee simple interest in Palmyra).

PPS alleged, *inter alia*, that the government effected a regulatory taking of PPS's contractual right to operate a commercial fishing base and trans-shipment point on Palmyra. The Court of Federal Claims granted the government's motion to dismiss PPS's complaint pursuant to Rule 12(b)(6), and the Federal Circuit affirmed.

The Court of Federal Claims and the Federal Circuit held that because the government did not appropriate PPS's contract rights and step into PPS's shoes as a contract party, no compensable taking had occurred. Hence, this case squarely presents the questions of whether contracts are property for Takings Clause purposes, and whether the government can be liable for regulatory as opposed to appropriative takings of contracts.

I. FACTUAL BACKGROUND

Palmyra sits in the equatorial Pacific, 1,000 miles south of Hawaii and 1,400 miles north of Samoa. App. 1a. During World War II the U.S. Navy built and operated a fighter base, including an airstrip, there. App 2a. Since the end of the war, however, the atoll has been desolate.

The property underlying PPS's takings claim is not the land of Palmyra, but is instead a private contract — a license by which the owners of Palmyra granted PPS the exclusive right to use the atoll as a commercial fishing base and trans-shipment facility. App. 2a-3a.

The contract granted PPS the exclusive right to use certain parts of Palmyra for any purpose. App.

3a. For example, the contract granted PPS the exclusive right to use a certain parcel as a base camp. *Id.* The contract also granted PPS the exclusive right to use other parts of Palmyra for particular purposes. *Id.* Most significantly, the contract gave PPS the exclusive right to use the airstrip on Palmyra for trans-shipping fish and seafood products, although the contract did not preclude other parties from using the airstrip for other purposes. *See id.*

Because Palmyra is United States territory, it is surrounded by a U.S. Exclusive Economic Zone ("EEZ"), commonly known as a 200-mile fishing limit. App. 3a. The Palmyra atoll is the only land within the Palmyra EEZ suitable for use as a commercial fishing base and trans-shipment facility; indeed, Palmyra is the only point within the EEZ where it is practical to locate an airstrip. *Id.* Accordingly, PPS's exclusive contract had great commercial value. *Id.*

To realize that value, PPS needed only to harvest fish from nearby open ocean waters of the EEZ and get them to the base on Palmyra, where PPS could quickly process the catch and promptly air-ship it to market. By contrast, PPS's competitors would need to expend time and resources steaming to distant ports in order to offload and process their catch, and then ship it to market.

PPS's exclusive rights under the contract to use Palmyra as a base and to use the Palmyra airstrip for trans-shipping fish gave PPS a double competitive advantage. *First*, because PPS's vessels did not need to transit back and forth to distant ports

between fishing sessions, PPS's operation was inherently more efficient — in terms of both time and resources consumed in harvesting a given quantity of fish — than its competitors'. *Second*, because PPS could immediately trans-ship its catch to market by air using the Palmyra airstrip, PPS's catch would reach market sooner and in better condition, thereby commanding a higher price.

Just as PPS began operations under the contract, however, the Government became "upset" that PPS's fishing operation might hinder a competing commercial enterprise on the atoll and sought ways to "beat up" on PPS in order to scuttle its operation — as internal Government documents that PPS obtained through a pre-litigation Freedom of Information Act ("FOIA") request and put before the Court of Federal Claims demonstrate. App. 39a-41a. The Government soon designated all waters surrounding Palmyra (including the water at PPS's dock and harbor) as a National Wildlife Refuge and prohibited all commercial fishing activity within the refuge waters. App. 3a-4a.

At law, fishing is broadly defined to include any activity reasonably likely to lead to the harvesting of fish. *See, e.g.*, 16 U.S.C. 973(6) (2006). Accordingly, the government's action precluded PPS from engaging, within the refuge waters, in any activity related to commercial fishing — such as sailing across the refuge waters on the way to or from the fishing beds outside the refuge boundaries, as well as loading and unloading PPS's fishing vessels at the dock.

Those activities, which would necessarily have taken place in refuge waters, were indispensable to PPS's commercial fishing operation on Palmyra, yet the government's regulation precluded them. Thus, the actions the government took with the avowed purpose of "beat[ing] up" on PPS had the inevitable effect of severely diminishing — perhaps entirely destroying — the economic value of PPS's contract. Accordingly, PPS alleged a regulatory taking of its property interest in the contract.

II. LEGAL PRINCIPLES AT ISSUE

A. The Circuits Are Split as to Whether Contracts are Property Protected by the Takings Clause

Like land, contracts have long been recognized as a form of property protected by the Takings Clause. For example, in the 1934 *Lynch* decision, this Court held, "The Fifth Amendment commands that property be not taken without making just compensation," and that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States*, 292 U.S. 571, 579 (1934)). *See also United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.") (citations omitted).

Indeed, the very case upon which the Court of Federal Claims and the Federal Circuit principally relied in dismissing PPS's claims — *Omnia Commercial Co. v. United States*, 261 U.S. 502

(1923) — holds that the "contract in question was property within the meaning of the Fifth Amendment," and that for the Takings Clause purposes there at issue, "[c]ontracts . . . do not differ from other kinds of property." *Id.* 509 (citation omitted).

Based on those decisions — and the expansive and unambiguous text of the Fifth Amendment — PPS views the question whether private contracts are property protected by the Takings Clause as a settled issue. Nevertheless, the Circuits are split on the point.

Like PPS, the Federal Circuit accepts the *Lynch* holding at face value. Indeed, in this case the court acknowledged that "contract rights can be the subject of a takings action." App. 6a (citing *Lynch*, 292 U.S. at 579). *See also Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) ("[T]here is also ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment.") (citing *Lynch*); *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1582 (Fed. Cir. 1997) (for Fifth Amendment purposes, "[c]ontracts, however, are property") (citing, *inter alia*, *Lynch*).

In the Seventh Circuit, by contrast, Judge Posner has made it equally clear that "'property' as used in [the takings] clause, . . . in this circuit anyway, . . . does not extend to contracts." *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (citing, *inter alia*, *Pro-Eco, Inc. v. Board of Comm'rs*, 57 F.3d 505, 510 (7th Cir. 1995)). Judge Posner's statement in *Pittman* is a clear expression of Seventh Circuit law on the point, but it is

arguably not essential to the holding in that case — *Pittman* involved a claim that certain government actions had taken tenure rights that arguably had been granted by statute rather than contract. Judge Kanne's decision in *Pro-Eco*, however, is squarely on point, holding that *Lynch* has been "effectively overrul[ed]" and that therefore "Pro-Eco's [contractual] option to buy real estate . . . is not a property interest protected by the Takings Clause." *Pro-Eco*, 57 F.3d at 510 & n.2. *See also Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed. 855 (1984) (statute that increased obligation of employers to pension fund upon employers' withdrawal from fund beyond contracted-for amount did not effect a compensable taking).

The Sixth Circuit has also held that in at least some circumstances contracts are not property protected by the Takings Clause. In the 1990 *Cavazos* case, the Sixth Circuit concluded that the contracts there at issue were "not 'property' under the Takings Clause." *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894, 901 (6th Cir. 1990).

Accordingly, the Federal Circuit is in conflict with the Sixth and Seventh Circuits on the first question presented by this petition. In recent decisions, other Circuits have expressed some doubt as to whether contracts are property for Takings Clause purposes while finding ways to avoid squarely deciding the issue, reflecting the current legal uncertainty. *See, e.g.*, *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374-75 (2d Cir. 2006) (expressing "misgivings" as to whether contracts

constitute cognizable property but "assum[ing]" they do and holding that no compensable regulatory taking of contract rights occurred based on application of the factors in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)).

B. The Circuits Are Also Split as to Whether the Regulatory Takings Doctrine Applies to Contracts

1. In the Federal Circuit, Takings Liability Attaches only to Direct Appropriations of Contracts

In analyzing takings claims, the Federal Circuit applies different standards depending upon the nature of the underlying property interest. Where the underlying property is land, outright appropriation is not an essential element of a takings claim — the Federal Circuit recognizes that under modern "regulatory takings" jurisprudence, government action that diminishes the value of a parcel can effect a taking even if the owner's formal title remains intact. *See, e.g.*, *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). This is consistent with this Court's regulatory takings jurisprudence. *See Lucas v. S.C. Coastal Council*, 505 U.S., 1003 (1992); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

As to purely contractual interests, however, the Federal Circuit (and therefore the Court of Federal Claims) does not apply modern regulatory takings doctrine but instead requires that the government appropriate the contract for itself (*i.e.*, step into the

shoes of the aggrieved contract party) before takings liability will attach. PPS's case illustrates the point.

Here, the Court of Federal Claims acknowledged that it was "troubled" by the documents PPS obtained through its FOIA request — a chain of Government e-mails demonstrating that in the months before the Palmyra Wildlife Refuge designation, Department of the Interior officials not only were "upset by . . . [PPS principal] Frank Sorba's plans" to operate a commercial fishing base on Palmyra but also were actively seeking someone to "beat up" on in order to scuttle PPS's operation. App 39a-41a. The court nevertheless dismissed PPS's complaint, concluding that under *Omnia*, "What [PPS] complain[s] of amounts, at most, to a frustration of purpose, rather than a taking . . . ." App. 36a. The court explained that:

> Plaintiffs have not, and cannot, allege that the Government has appropriated the benefits of plaintiffs' licenses for itself or has sought to step into the shoes of plaintiffs as licensees to establish Interior's own commercial fishing operation. Plaintiffs' licenses have been "[brought] to an end," not kept alive for the benefit of the Government in the same manner as the contract at issue in *Omnia:* "[T]he performance of the contract was rendered impossible. It was not appropriated, but ended." *Omnia*, 261 U.S. at 511, 513, 43 S.Ct. 437. The doctrine of frustration is the

> correct theory under which plaintiffs complain. "Frustration and appropriation are essentially different things." *Id.* 513, 43 S.Ct. 437.

App. 42a. Thus, the Court of Federal Claims concluded that where the property underlying a takings claim is a contract, outright appropriation of the property at issue is an essential element of the claim.

The Federal Circuit affirmed, applying essentially the same reasoning. Writing for the panel, Judge Bryson articulated a two-part test for establishing a compensable taking of a contract. *First*, Judge Bryson indicated that government action that "alter[s] [plaintiffs'] contract rights in a way that affects their underlying [non-contract] property rights" could constitute a compensable taking. App. 16a. *Second*, Judge Bryson indicated that the government can effect a compensable taking of contract rights by "stepp[ing] into the shoes of a contracting party so as to appropriate that party's contract rights . . . ." *Id.*

In holding that PPS had not stated a valid takings claim, Judge Bryson took it for granted that the Wildlife Refuge designation did not affect any property interest PPS may have had other than the contract. *See* App. 16a ("The plaintiffs here have not alleged that the government has altered their contracts in a way that affects their underlying property rights"). Judge Bryson then reasoned that because PPS had "not alleged that the government has stepped into the shoes of a

contracting party so as to appropriate that party's contract rights," PPS's takings claim was barred. App. 16a.

In so doing, Judge Bryson first observed that:

> As a general matter, the government does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights. The Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923) has long stood for that proposition.

App. 7a. As to the particulars of PPS's claim, Judge Bryson then explained that "[t]he fact that the government's regulation of activities in the waters surrounding Palmyra may have adversely affected the value of [PPS's] contract rights to engage in activities on shore is not sufficient to constitute a compensable taking." App. 10a-11a.

Notably, although the Court of Federal Claims readily acknowledged that PPS had alleged "both a categorical and [a] regulatory taking," App. 27a, Judge Bryson ignored regulatory takings doctrine in analyzing PPS's claim on appeal. Judge Bryson's opinion does not include the words "regulatory taking." *See generally* App. 1a-22a. It does not cite the progenitor of regulatory takings jurisprudence, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). App. 1a - 22a. And it neither cites *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104

(1978), nor applies anything like the analytical structure *Penn Central* establishes for deciding regulatory takings claims. App.1a - 22a.

Instead of applying regulatory takings doctrine the *Mahon* and *Penn Central* decisions herald, Judge Bryson relied on *Omnia* and a recent Federal Circuit decision, *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008) for the proposition that where purely contractual interests are at stake, only a direct appropriation can give rise to a takings claim. Judge Bryson described *Huntleigh* as holding that "the government does not 'take' a party's contract rights simply because its regulatory activity renders those contract rights valueless." App. 8a-9a. Judge Bryson continued, "Huntleigh conceded that *the government did not actually assume its contracts, and for that reason we held that no takings claim could be predicated on a taking of the contracts.*" App. 9a (emphasis added).

Accordingly, Judge Bryson's opinion — and Federal Circuit doctrine — rejects any possibility that a regulatory taking of a private contract could occur and thereby mandates that where purely contractual interests are at stake, only direct appropriations will constitute compensable takings.

2. Other Circuits Apply a Regulatory Takings Analysis to Contracts

On this point, Federal Circuit doctrine again conflicts with that of other Circuits. For example, the Fifth Circuit applied regulatory takings doctrine to a claim that a state statute effected a taking of contract rights — and held that a compensable taking had

occurred — in *United States Fidelity & Guaranty v. McKeithen*, 226 F.3d 412, 416-20 (5th Cir. 2000). In that case, the state did not appropriate the underlying contracts; instead, it legislatively imposed additional obligations upon one of the contracting parties. It is obvious that if the Fifth Circuit had believed that contracts could only be taken by direct appropriation rather than regulatory taking, the outcome would have been different.

Likewise, in *Vesta Fire Insurance Corp. v. Florida*, 141 F.3d 1427 (11th Cir. 1998), the Eleventh Circuit analyzed a claim that a state statute imposing additional liability on insurers worked a compensable taking of the insurer's contract rights. The court of appeals reversed the district court's decision on summary judgment that no taking had occurred, and remanded with instructions that the court apply the *Penn Central* factors properly. *Vesta*, 141 F.3d at 1432-33. Again, it is obvious that if direct appropriation were a required element of a claim that the statute worked a compensable taking of the insurer's contract rights, the outcome would have been different.

Similarly, in the 2007 *Holliday Amusement* case, the Fourth Circuit analyzed whether a South Carolina law outlawing certain video gaming devices effected a compensable taking of (among other property) contracts for the distribution of the machines. *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007). South Carolina did not assume for itself any rights under the distribution contracts — the State's interest was in outlawing the machines, not in

distributing them on its own account. In the language of *Omnia*, it frustrated rather than appropriated the contracts. But the Fourth Circuit applied standard regulatory takings doctrine including the *Penn Central* factors to determine whether a compensable taking had occurred (concluding that none had). *Holliday*, 493 F.3d at 410-11 & n.2.

Accordingly, the doctrine the Federal Circuit applied to PPS's claim — that a regulatory taking of a contract cannot occur unless the government steps into the shoes of the aggrieved contract party — clearly conflicts with Fourth, Fifth, and Eleventh Circuit doctrine on the same point of law.

REASONS FOR GRANTING THE PETITION

I. THE ISSUES PRESENTED HERE ARE OF GREAT NATIONAL IMPORTANCE

This case squarely presents the issue of whether government action having the purpose and effect of diminishing or eliminating the value of a private contract, but that does not involve government assumption of the rights of the aggrieved party, can *ever* give rise to takings liability. The Federal Circuit says no, insisting that outright appropriation is a prerequisite.

The government's responses to recent economic developments demonstrate the enormous (and increasing) importance of the issue. If press accounts are to be believed, the government has recently been considering targeted alteration of private contracts in a variety of contexts as a means of dealing with some of

the presumed causes and symptoms of the current economic downturn.

For example, anger over losses at financial firms that have received federal support (especially AIG) has boiled over into initiatives to revoke legislatively elements of the contractual compensation (typically, bonuses) of certain classes of employees of such firms. For example, ABC News reported in March 2009 that U.S. Senator Charles Schumer of New York proclaimed in a speech from the Senate floor, "Let the recipients of these large and unseemly bonuses be warned – if you don't return it on your own, we'll do it for you." Jonathan Karl, *The AIG Bonus Tax: "Give the money back or we'll take it away"*, ABC News, The Note, Mar. 17, 2009, http://blogs.abcnews.com/thenote/2009/03/the-aig-bonus-t.html.

In the March 17, 2009 version of PBS's NewsHour program, host Ray Suarez framed the issue presented by Congressional efforts to negate the AIG bonuses thusly: "Now that Congress and the White House are trying to figure out how to get back AIG's bonus money, the question remains, what kind of fallout might there be if the government is successful?" *PBS Newshour: Calls Intensify on Capitol Hill to Recover AIG Bonuses* (Television broadcast Mar. 17, 2009), *available at* http://www.pbs.org/newshour/bb/business/jan-june09/aigfallout_03-17.html.

The "fallout" could include liability under the Takings Clause, as the comments of guest Andrew Ross Sorkin, a New York Times columnist, suggested:

"[W]e can't just point all the fingers at [AIG] and say, 'Listen, we're ripping up the contracts unilaterally.' It just doesn't work like that. We don't — fortunately or unfortunately, we still live in a country that's based on laws." *Id.*

But guest Robert Kuttner, co-editor of the American Prospect magazine, downplayed those concerns, arguing that: "This is an emergency. . . . And if the Obama administration doesn't find a way of persuading these guys to give back the bonuses voluntarily, there's going to be a huge groundswell and Congress is going to do it for them." *Id.* Mr. Kuttner expressed his amazement that "any serious person would defend these bonuses either on grounds of retaining smart people or on grounds that a contract is sacrosanct." *Id.*

Should Congress ultimately choose to target contractual bonuses for legislative elimination or reduction, the same issues presented in this case could well determine whether the government will be liable under the Takings Clause.

Other current government action may also implicate the issues presented here. An October 14, 2009 editorial in the Wall Street Journal describes a government initiative called the "Second Lien Modification Program," which goes by the moniker "2MP." *See* Editorial, *MBS, R.I.P.?*, Wall. St. J., Oct. 14, 2009, at A22, *available at* http://online.wsj.com/article/SB10001424052748704471504574443072479356040.html. As the Journal describes it, the purpose of 2MP is "to help borrowers achieve greater affordability by lowering

payments on both first lien and second lien mortgage loans." *Id.* In effect, the Journal notes, 2MP alters the contractual terms of mortgage-backed securities by protecting second-lienholders at the potential expense of first-lienholders.

Helping strapped homeowners avoid foreclosures seems, at least at first blush, to be a laudable goal. As the Journal points out, however, contractual expectations create and sustain the market for mortgage-backed securities, which itself purportedly makes home-buying more affordable. As the Journal explains, the expectation that existed when the MBS contracts were made was that "[i]n the event of a foreclosure, second liens would be extinguished first and holders of the first mortgage would get what was left because that's what the contract said." *Id.*

According to the Journal, "[t]his changed in April when Treasury announced that instead of foreclosing on delinquent borrowers and wiping out second liens, mortgage servicers (mainly the biggest banks) would be given incentives to modify both loans, thereby spreading the losses." *Id.* Thus, the Journal asserts that 2MP program will "undermine private mortgage-backed securities (MBS) contracts." *Id.* The editorial continues:

> A vibrant MBS market depends on the sanctity of U.S. contracts. If the world's investors see that the Treasury is willing to reward banks at their expense [by altering the contractual priority structure of MBS contracts], there will be fewer such investors in U.S. securities. There will also be less

> capital for housing. Treasury needs to revisit its foreclosure rules to protect the U.S. reputation of honoring contracts, and the faster the better.

Id.

To the extent that 2MP (or a similar program) alters private contracts, aggrieved parties are likely to raise takings claims and the precise issues presented in this case could be determinative. Private parties as well as government actors deserve to know what rules will apply in determining whether particular government actions will or will not result in takings liability.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT INVOLVING THE APPLICATION OF THE TAKINGS DOCTRINE TO CONTRACTS

A. The Court Should Resolve the Circuit Split as to Whether Private Contracts are Property Protected by the Takings Clause

As noted *supra*, the Circuits are split on the issue of whether contracts constitute property for purposes of the Takings Clause. The Federal Circuit takes at face value this Court's holding in *Lynch* that "[t]he Fifth Amendment commands that property be not taken without making just compensation" and that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch*, 292 U.S. at 579.

The Seventh Circuit, however, reads *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), as establishing that "the Supreme Court [does] not view the Takings Clause as protecting mere contract rights." *Pro-Eco*, 57 F.3d at 510. The Seventh Circuit also reads *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), "as effectively overruling . . . *Lynch* . . . to the extent that it flatly holds that contracts are property that the government may not take without compensation." *Pro-Eco* at 510 n.2.

Guidance from this Court would surely be useful. *Lynch*, while stating a seemingly clear-cut rule, could conceivably be read as a Due Process decision rather than a Takings Clause decision. *Id. Lynch* is not, however, the only of this Court's decisions expressing the view that contracts are property for Fifth Amendment purposes. *Omnia* also speaks to the point, holding that "[t]he contract in question was property within the meaning of the Fifth Amendment . . . and if taken for public use the government would be liable." *Omnia*, 261 U.S. at 508. Thus, *Omnia* holds that for Takings Clause purposes, contracts are protected property.[1]

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[1] This invites the question discussed *infra* — whether contracts can be the subject of regulatory as opposed to appropriative takings. *Omnia*, a case decided in 1923, followed *Mahon* by less than three months and thereby predates nearly the entire development of modern regulatory takings jurisprudence. As we discuss below, however, *Omnia* suggests that regulatory takings principles do apply to contracts.

Presumably, the Seventh Circuit would view *Security Industrial Bank* and *Connolly* as "effectively overturning" not only *Lynch* but all decisions (including *Omnia*) holding that contracts are property for Takings Clause purposes. *See Pro-Eco*, 57 F.3d at 510 & n.2. But the Seventh Circuit's analysis is questionable. Neither *Security Industrial Bank* nor *Connolly* involved a claim that property in the form of a contract had been taken. The property interest at issue in *Security Industrial Bank* was a lien interest in personal property pledged as collateral for certain loans, *Security Industrial Bank*, 459 U.S. at 71-72, 75-76,[2] while the plaintiffs in *Connolly* alleged a taking of the assets used to comply with the statutorily increased pension-fund withdrawal liability, not the contractual right to withdraw on less onerous conditions. *Connolly*, 475 U.S. at 221.

In an environment where the government appears poised to target private contracts for abrogation, contract parties as well as government actors deserve to know whether contracts are or are not property protected by the Takings Clause from government intrusion, and the Court should resolve the uncertainty that the existing Circuit split on the point fosters.

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[2] Moreover, in holding that the statute in play — an amendment to the Bankruptcy Code changing the bankruptcy treatment of the underlying loans — would apply only prospectively, the Court avoided deciding the Takings Clause issue. *Id.* at 78.

B. The Court Should Also Resolve the Circuit Split as to Whether the Government Can Be Liable for Regulatory Takings of Contracts

The Court of Federal Claims and the Federal Circuit held in this case that PPS could only have presented a valid takings claim if the government had appropriated its contract and stepped into PPS's shoes as licensee. Thus, the Federal Circuit draws a doctrinal distinction between contracts and all other property cognizable under the Takings Clause. All other cognizable property interests can be the subject of regulatory as opposed to appropriative takings, but where the property interest at stake is purely contractual, the Federal Circuit sidesteps regulatory takings analysis, eschews the *Penn Central* factors, and finds takings liability only where the government assumes for itself the rights of the aggrieved contract party.

By contrast, as described above, the Fourth, Fifth, and Eleventh Circuits apply standard regulatory takings doctrine, including the *Penn Central* factors, in deciding whether a compensable taking of a contract has occurred. *See Holliday Amusement Co.*, 493 F.3d 404; *United States Fid. & Guar. Co.*, 226 F.3d 412; *Vesta Fire Ins. Corp.*, 141 F.3d at 1427.

As described below, this Court's regulatory takings jurisprudence expresses no carve-out for property that happens to be in the form of a contract and therefore supports the Fourth, Fifth, and Eleventh Circuits' approach. The Federal Circuit's contrary doctrine reflects an outdated and incorrect understanding of the

Takings Clause, and the Court should resolve the split by rejecting the Federal Circuit approach.

1. The Regulatory Takings Doctrine has Supplanted the "Direct Appropriation" Theory of Takings

The theory that the Federal Circuit applies to contracts — that a taking will only arise where the government appropriates the contract and assumes the rights of the aggrieved contract party — is an historical relic that this Court has rejected for every other form of property protected by the Takings Clause. As Justice Scalia noted for this Court in *Lucas*, "Prior to Justice Holmes's exposition in . . . *Mahon*, . . . it was generally thought that the Takings Clause reached only a 'direct appropriation' of property." *Lucas*, 505 U.S. at 1014. The opinion continues:

> Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was neces. . . . If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' . . . These considerations gave

> birth to the oft-cited maxim that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Id. (citations omitted) (brackets in original).

As Justice Scalia further observed:

> [The Court's] decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seem as going 'too far' for purposes of the Fifth Amendment. In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'

Lucas, 505 U.S. at 1015 (citing *Penn Central*, 438 U.S. at 124).

In *Penn Central*, the Court discerned three standards especially relevant to the admittedly "essentially ad hoc, factual inquir[y]" governing a regulatory takings claim. Specifically, the Court noted the "factors that have particular significance" include "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct, investment-backed expectations," and "the character of the government action." *Penn Central*, 438 U.S. at 124.

2. The Regulatory Takings Doctrine Has Been Extended to all Forms of Property

The regulatory takings doctrine established in *Mahon* and fleshed out in *Penn Central* has since been applied to every form of property protected by the Takings Clause — real property, tangible personal property, and intangible property and (outside the Federal Circuit) contracts.

There can be no serious doubt that regulatory takings doctrine applies to government action that affects interests in real property; *Mahon* and *Penn Central* both involved real property. Moreover, this Court's decision in *Lucas* not only provides a comprehensive account of the history of regulatory takings jurisprudence as applied to real property, but also endorses the continued vitality of that doctrine. *See Lucas*, 505 U.S. at 1014-19.

The Court's decision in *Andrus v. Allard*, 444 U.S. 51 (1979) applies regulatory takings standards — including expressly the three *Penn Central* factors — to personal property, ultimately concluding based on application of the factors to the particular circumstances that no compensable taking had occurred. To be sure, that decision suggests that regulatory takings claims involving personal property will be difficult to support where the owner of the property is left with substantial rights to the property. But not impossible — the outcome in *Andrus* was driven by the difficulty of satisfying the *Penn Central* factors where the property underlying the claim is personal property and the owner was deprived only of the right to sell, not because personal property

is *per se* excluded from the protection provided by the Takings Clause. *Id.* 64-68.

The Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) establishes that regulatory takings applies to intangible property interests. Like *Andrus*, *Ruckelshaus* countenances the application of the *Penn Central* factors to government action that affected the underlying property, there a trade secret, in order to determine whether a compensable taking has occurred. *Ruckelshaus*, 467 U.S. at 1005-14.

Although *Penn Central*, *Andrus*, and *Ruckelshaus* suggest that regulatory takings doctrine applies equally to all property that is protected by the Takings Clause, the Court has not yet had occasion to evaluate whether the doctrine applies equally to contracts as it does to real property, personal property, and intangible property. As noted above, other Circuits apply standard regulatory takings jurisprudence to claims alleging non-appropriative takings of private contracts. By contrast, the Federal Circuit declined to do so in PPS's case, relying instead on *Omnia* for the proposition that the government must step into the shoes of the aggrieved contract party in order to effect a compensable taking.

3. *Omnia* Does Not Carve Contracts out of the Regulatory Takings Doctrine

The Federal Circuit's reading of *Omnia* is not correct; *Omnia* does not countenance the *per se* exemption of contracts from regulatory takings doctrine. It is true both that *Omnia* holds that no

compensable taking of the contract there at issue occurred and that *Omnia* notes that the government action in question frustrated rather than appropriated the plaintiff's contract. *See Omnia*, 261 U.S. at 513 ("[T]he effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government.").

But this does not create a general rule that frustration of a contract can *never* amount to a regulatory taking. Rather, it merely articulates the Court's conclusion that *in the circumstances presented there*, the frustration did not rise to the level of a taking. Several elements of the *Omnia* opinion make this clear.

As an initial matter, nothing in *Omnia* suggests that contracts enjoy less Fifth Amendment protection than other forms of property. To the contrary, *Omnia* holds that contracts are entitled to *the same* protection as other forms of property. For example, the *Omnia* Court noted that

> there are many laws and governmental operations which injuriously affect the value of or destroy [other forms of] property — for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion — but for which no remedy is afforded. *Contracts in this respect do not differ from other kinds of property.*

Omnia, 261 U.S. at 508-09 (citation omitted) (emphasis added). Because *Omnia* post-dates

Mahon, the implication of that statement is that contracts are subject to the regulatory takings doctrine established by *Mahon*.

Moreover, despite pre-dating *Penn Central* by more than five decades, *Omnia* addresses the same three considerations the Court eventually articulated in *Penn Central*, albeit somewhat obliquely. Accordingly, *Omnia* can properly be understood as an early (and therefore not fully articulated) application of regulatory takings doctrine to property in the form of a private contract.

The *Omnia* Court plainly considered the first *Penn Central* factor — the economic impact of the government's action on the claimant — noting that "[t]he contract was of great value, and if carried out would have produced great profits." *Omnia*, 261 U.S. at 507. It is fair to infer that this factor, standing alone, would have favored finding a taking had the Court analyzed the case based on today's regulatory taking standards.

But the "economic impact" factor does not stand alone in modern regulatory takings jurisprudence, nor was it the only *Penn Central* factor upon which the *Omnia* opinion touches. The *Omnia* Court also discussed the second *Penn Central* factor — the extent to which the government's action interfered with distinct, investment-backed expectations of the plaintiff. In the very first sentence of the opinion, presenting the facts of the case, Justice Sutherland conspicuously notes that the plaintiff acquired its contract rights "by assignment" — perhaps implying that the plaintiff was either on notice of the likelihood of a subsequent requisition, that the plaintiff was engaged in war

profiteering rather than commercially reasonable conduct, or both. *Omnia*, 261 U.S. at 507. Two sentences later, Justice Sutherland notes that the government's requisition of the contracted-for steel came only five months later, reinforcing the implication. *Id.*

The Court's exegesis of the many circumstances in which government action that adversely impacts the value of real or personal property does not give rise to takings liability, *id.* 508-09, indicates that the plaintiffs' expectations should have been calibrated against the possibility of a wartime requisition, and therefore would not have been reasonable had they anticipated the contract would certainly be performed. Accordingly, the "reasonable expectations" factor cuts distinctly *against* the notion that the Court would have found a regulatory taking in *Omnia* had it somehow had the prescience to apply today's regulatory takings standards.

In addition, Justice Sutherland also addressed the third *Penn Central* factor — the character of the governmental action underlying the claim — noting that the action in question was a wartime requisition and explaining the extremely high deference the government is given in prosecuting war. The opinion strongly suggests that this factor was decisive, stating that:

> The government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound, the

> government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible.

Id. 513.

That passage conveys three important characteristics of the government's action, none of which is present in PPS's case. *First*, the requisition at issue in *Omnia* involved the government's paramount power to protect national security. No such interest is implicated by the Wildlife Refuge designation at issue in PPS's case. *Second*, the action was one component of a broader wartime requisition program and, as such, was not targeted at the plaintiff alone. Rather, individuals and businesses throughout the country were being asked to sacrifice in order to support the war effort. In PPS's case, by contrast, PPS was — by government design — the only adversely affect party. *Third*, that shared sacrifice was demanded in support of a goal that would plainly and significantly benefit everyone in the country — success in a world war. In such circumstances, "average reciprocity of advantage" — a factor Justice Holmes identified in *Mahon* as critical to prior decisions where no takings had been found, *see Mahon*, 260 U.S. at 415 — is inherent in the government action. Under the wartime circumstances, the character of the government's action would plainly cut against finding a taking had the *Omnia* Court somehow had the foresight to apply the *Penn Central* factors expressly. By contrast, the Wildlife Refuge designation had the

purpose and effect of benefiting a competing commercial enterprise on Palmyra — the operator of an exclusive "eco-tourism camp" — at PPS's expense, and therefore no "average reciprocity of advantage" existed. *See* App. 39a-41a.

4. *Connolly* Suggests that Regulatory Takings Doctrine Applies to Contracts

In the 85-plus years since *Omnia*, the case in which the Court has come closest to addressing definitively the question of whether government action that affects, but does not appropriate a contract, can work a regulatory taking is probably *Connolly*. *See Connolly*, 475 U.S. 211. *Connolly* involved a statute that imposed upon employers that exercised a contractual right to withdraw from certain pension plans liability greater than that specified in the contracts. *Id.* 216-18.

The *Connolly* plaintiffs disavowed any claim that Congress had taken their contractual right to withdraw from the pension fund with certain, limited consequences. *Id.* 221. The Court nevertheless discussed whether contract rights could be the subject of a regulatory takings claim. The Court left the issue open, noting that "the fact that legislation disregards or destroys existing contractual rights does not *always* transform the regulation into an illegal taking." *Id.* 224 (citing, inter alia, *Omnia*) (emphasis added). The Court's use of the word "always" plainly leaves open the possibility that when government action affects contracts, regulatory takings liability will attach *sometimes*. *Id.* 224.

Moreover, in supporting its holding that the statute was not facially invalid for violating the Takings Clause, the Court discussed extensively how the three *Penn Central* factors would apply. *Id.* 225-27. This strongly suggests that the *Connolly* Court believed that the proper way to determine whether a regulatory taking of contract rights has occurred is to apply the *Penn Central* factors — not to rely exclusively on whether the government has assumed the rights of the aggrieved contract party, as the Federal Circuit did in PPS's case.

Nothing in this Court's regulatory takings jurisprudence suggests that the government can only effect a compensable taking of a private contract by appropriating the contract and stepping into the shoes of the aggrieved party, yet that is the rule the Federal Circuit applied. That Federal Circuit doctrine — as articulated and applied in this case — conflicts with that of other Circuits. PPS respectfully submits that the Federal Circuit has it wrong, and respectfully urges the Court to resolve the Circuit split and to express clearly that regulatory takings doctrine applies equally to contracts as to other forms of property.

CONCLUSION

The Circuits are split on two fundamental questions governing contractual relationships — whether contracts are property protected by the Takings Clause of the Fifth Amendment and, if so, whether regulatory takings doctrine applies to contracts.

The Court should grant this petition for a writ of certiorari and undertake to resolve those questions.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED APRIL 9, 2009

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 2008-5058.

April 9, 2009.

PALMYRA PACIFIC SEAFOODS, L.L.C., Palmyra Pacific Enterprises, L.L.C., PPE Limited Partnership, and Frank Sorba,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Before BRYSON, GAJARSA, and MOORE, Circuit Judges.

BRYSON, Circuit Judge.

Palmyra Atoll is a tiny island in an empty portion of the Pacific Ocean. It is approximately 4.6 square miles in area and is located about 1100 miles south of Hawaii and 1400 miles north of Samoa. There is almost nothing else in between. As the Supreme Court aptly put it, "It is hard to conceive of a more isolated piece of land

than Palmyra." *United States v. Fullard-Leo*, 331 U.S. 256, 280, 67 S.Ct. 1287, 91 L.Ed. 1474 (1947).

During World War II, the United States established a naval base there, where it constructed an airstrip, a base camp, and a pier. After the war the United States sued to quiet title to Palmyra, but the Fullard-Leo family successfully opposed the effort and obtained fee simple title to the island. *Fullard-Leo*, 331 U.S. at 280, 67 S.Ct. 1287. This case involves a claim brought by parties who wished to use the island as a commercial fishing base and who contend that the government impermissibly interfered with their fishing business by designating the waters around Palmyra as a wildlife refuge.

I

Prior to the events at issue in this case, the plaintiffs obtained from the Fullard-Leo family the right to use certain facilities on Palmyra. The rights were conveyed through a series of contracts, beginning with a contract in which the Fullard-Leo family granted the Palmyra Development Company the right to convey an exclusive license to establish a commercial fishing operation on the atoll. The Palmyra Development Company then entered into a licensing agreement with Palmyra Pacific Enterprises, L.L.C. That agreement granted Palmyra Pacific Enterprises the exclusive right to establish a commercial fishing operation on Palmyra and to use the island's facilities for that purpose. Subsequently, Palmyra Pacific Enterprises assigned its rights to PPE Limited Partnership, which in turn assigned its rights to Palmyra Pacific Seafoods, L.L.C. ("PPS").

Appendix A

The pertinent provisions of the contract between Palmyra Development Company and Palmyra Pacific Enterprises conveyed to Palmyra Pacific Enterprises "the exclusive right and license to occupy, use and enjoy" the base camp on the atoll as well as "the exclusive right to use the Small Boat Harbor," and "the exclusive right to use one-half of the deep water dock." The contract also granted a "Commercial Fishing License" purporting to give Palmyra Pacific Enterprises an exclusive right to fish in the waters surrounding Palmyra as well as a non-exclusive "Aircraft Runway License" for use of the island's airstrip.

The plaintiffs assert that the right to establish a commercial fishing operation is valuable because Palmyra is surrounded by a 200-nautical-mile Exclusive Economic Zone ("EEZ") from which foreign fishing vessels are excluded. Palmyra is the only place within the EEZ where it is practical to locate a commercial fishing operation. According to the plaintiffs, the exclusive use of the island and its airstrip affords a material competitive advantage over any competing fishing enterprises that might operate in the region.

In 2000, The Nature Conservancy, a non-profit entity, purchased much of the emergent land on Palmyra from the Fullard-Leo family. Beginning some time prior to July 2000, the Fish and Wildlife Service of the Department of the Interior began working with The Nature Conservancy to establish a nature preserve and eco-tourism camp at Palmyra. The plaintiffs allege that the government and The Nature Conservancy were

concerned about the effect that PPS's commercial fishing operation would have on the proposed eco-tourism camp and accordingly sought to interfere with PPS's operation. According to the plaintiffs, the ensuing government action flowed from the desire to support The Nature Conservancy's efforts.

On January 18, 2001, the Secretary of the Interior signed an order designating Palmyra's tidal lands, submerged lands, and surrounding waters out to 12 nautical miles from the water's edge as a National Wildlife Refuge. Subsequently, the Department of the Interior published a regulation providing for the management of the refuge. 66 Fed.Reg. 7660-01 (Jan. 24, 2001). The regulation states, in pertinent part:

> We will close the refuge to commercial fishing but will permit a low level of compatible recreational fishing for bonefishing and deep water sportfishing under programs that we will carefully manage to ensure compatibility with refuge purposes.... Management actions will include protection of the refuge waters and wildlife from commercial fishing activities.

In March 2003, The Nature Conservancy conveyed 416 acres of the emergent land of Palmyra to the United States to be included in the refuge. It subsequently added 28 more acres to the conveyance.

In January 2007 the plaintiffs filed a complaint in the Court of Federal Claims alleging that the Interior

Department regulation had "directly confiscated, taken, and rendered wholly and completely worthless" their property interests "embodied and reflected" in their licenses. The government moved to dismiss the complaint for failure to state a claim, and the court granted the motion.

The court noted that the Interior Department regulation was directed only to the "tidal lands, submerged lands, and waters" surrounding Palmyra, and that the Fullard-Leo family lacked authority to grant a license governing activities, including fishing, in those areas. *Palmyra Pac. Seafoods, L.L.C. v. United States*, 80 Fed.Cl. 228, 232 (2008). To the contrary, the court explained, the plaintiffs' interests permitted them only "to use the emergent land of Palmyra for the purpose of establishing a commercial fishing operation." *Id.* at 233. The court accepted the plaintiffs' assertion that the government's "closure of the waters surrounding Palmyra to commercial fishing frustrated the purpose of the licenses." *Id.* Because the plaintiffs had acquired no right to engage in commercial fishing in that area, however, the court held that the government's action "did not appropriate a contractual right to commercial fishing granted [by the licenses] as such a right could not have been granted." *Id.* Even assuming that the plaintiffs' licenses constituted property interests that would be cognizable in a takings action, the court concluded that the plaintiffs had "failed to allege that the Government's designation of the Palmyra National Wildlife Refuge and closure of the refuge to commercial fishing directly regulated operations under those

licenses," and thus no taking of the plaintiffs' licenses had occurred. *Id.* at 236. Because the plaintiffs had not "asserted a cognizable property interest subject to the government action sufficient to support a takings claim under the Fifth Amendment," the court ruled that they had failed to state a claim upon which relief could be granted. *Id.* The plaintiffs appealed that ruling to this court.

II

The basic principles governing takings analysis are well settled and are not in dispute here. First, in order to have a cause of action for a Fifth Amendment taking, the plaintiff must point to a protectable property interest that is asserted to be the subject of the taking. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' ") (citation omitted). Second, contract rights can be the subject of a takings action. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States."); *see also United States v. Petty Motor Co.*, 327 U.S. 372, 381, 66 S.Ct. 596, 90 L.Ed. 729 (1946) (holding that plaintiff was entitled to

compensation for government's taking of option to renew a lease).

The parties disagree about the application of those general principles to the facts of this case. The plaintiffs argue they are entitled to compensation because the government's regulation was targeted at their commercial fishing operation and "effectively transferred PPS's property-its rights under the contract-back to PPS's contractual counterparty, the politically favored and powerful Nature Conservancy." The government, on the other hand, contends that it did not "take" any contract right of the plaintiffs and that any injury that the plaintiffs suffered as a result of the Interior Department regulation was a consequence of lawful government action and did not reflect the taking of any property right obtained by the plaintiffs through contract.

As a general matter, the government does not "take" contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights. The Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923), has long stood for that proposition. In *Omnia*, the federal government requisitioned all of the steel produced by the Allegheny Steel Company. Because Omnia had a contract to purchase steel from Allegheny, which was frustrated by the government's requisition, Omnia brought suit against the government for the purported "taking" of

its contract. The Supreme Court held that there was no taking. The Court made clear that when a party alleges that a contract has been taken, courts should distinguish between the claimed taking of the subject matter of a contract and the taking of the contract itself, and it held that a showing that the subject matter of a contract has been taken is not sufficient to demonstrate that the contract itself has been taken. The Court described the government's requisition of the steel underlying the contract as a taking of the subject matter of the contract and made clear that by taking that subject matter the government did not take the contract. On the other hand, the Court explained, when there has been an "acquisition of the obligation or the right to enforce it" by the government, the government's action would qualify as a taking of contract rights. *Omnia*, 261 U.S. at 511, 43 S.Ct. 437.

The Court applied that framework the following year when it considered a Presidential order to appropriate a contract to build a ship under the Emergency Shipping Act. In that case, *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 44 S.Ct. 471, 68 L.Ed. 934 (1924), the Court found that the government had taken the claimant's contract. The Court explained:

> [T]he orders given the builder show that expropriation of claimant's contract and rights was intended. By its orders it put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages

> that an assignee of the contract would have had. The credit for, and advantages under the contract resulting from, payment of $419,500, made by claimant to builder were taken. The use of the plans and specifications for the construction of the ship as well as the benefit of inspection prior to the requisition date, August 3, 1917, were also taken over. The contract was not terminated. The direct and immediate result of the requisition orders and acts of the Fleet Corporation was to take from claimant its contract and its rights thereunder.

Id. at 120, 44 S.Ct. 471.

We applied the principles of those cases in our recent decision in *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed.Cir.2008). In that case, a private company that had contracts to provide baggage and passenger screening in U.S. airports brought suit for a taking of its contract rights after Congress federalized the screening functions in 2002. The statute creating the Transportation Security Administration had the effect of terminating all of Huntleigh's screening service contracts at U.S. airports. This court denied Huntleigh's request for compensation. We held that the government does not "take" a party's contract rights simply because its regulatory activity renders those contract rights valueless. Huntleigh conceded that the government did not actually assume its contracts, and for that reason we held that no takings claim could be predicated on a taking of the contracts. 525 F.3d at 1379.

Appendix A

In attempting to define the property right that was purportedly taken by the regulation at issue in this case, the plaintiffs have provided little beyond the general assertion that the Interior Department interfered with their "exclusive right to use Palmyra as a commercial fishing base." They contend that "the contract entitled PPS to the exclusive occupation and use of certain lands of the atoll (e.g., the base camp)," and refer to a "right to use certain facilities on Palmyra as the base for its commercial fishing operation." The problem with that argument is that the Interior Department's regulation does not prohibit commercial fishing operations on Palmyra-it merely prohibits commercial fishing activity in the surrounding waters.[1] The fact that the government's regulation of activities in the waters surrounding Palmyra may have adversely affected the

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1. Although the government characterizes the plaintiffs' claim as a right to engage in commercial fishing in the waters around Palmyra, the plaintiffs have made clear that their takings claim is not based on any claim of a right to fish in the EEZ or in the waters within 12 miles of Palmyra, but rather on their asserted right to operate a commercial fishing operation on Palmyra. We agree with the government that our decision in *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed.Cir.2004), would foreclose any possible claim that the plaintiffs had a compensable "right to fish" in the EEZ. In *American Pelagic*, a fishing company asserted a takings claim because of the loss of its fishery permits. After reviewing the history of the pertinent legislation, we concluded that there is no "historical common law right to use vessels to fish in the EEZ," *id.* at 1380, and we therefore held that American Pelagic "did not and could not possess a property interest in its fishery permits," *id.* at 1374.

value of their contract rights to engage in activities on shore is not sufficient to constitute a compensable taking. While at this stage of the proceedings we must accept the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff, *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir.1991), the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007). The complaint in this case fails to do so.

Our decision in *Colvin Cattle Co. v. United States*, 468 F.3d 803 (Fed.Cir.2006), addressed a claim analogous to the plaintiffs' claim in this case. In that case, a ranch owner argued, *inter alia*, that the government's refusal to allow grazing on federal land near the ranch had reduced the value of the ranch and thus constituted a taking of the ranch. *Id.* at 808. We rejected that claim, holding that the fact that the ranch may have lost value because of the government's grazing restriction was "of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest." *Id.* Because the ranch owner had no property right to graze cattle on federal land, the government's prohibition on grazing did not constitute a taking of the ranch owner's property. *See also Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215-16 (Fed.Cir.2005) (frustration of heliport operator's business expectations due to new federal air traffic restrictions in the vicinity of the heliport did not constitute a compensable taking). The

same analysis applies to the plaintiffs' claim that the government's prohibition on commercial fishing in the waters surrounding Palmyra has taken their rights to run a commercial fishing operation on the island. The ban on fishing may have reduced the value of the plaintiffs' license to operate on the island, but that reduction in value, as in *Colvin Cattle,* is not the result of a compensable taking of any cognizable property interest.

The plaintiffs rely on two of this court's cases, but those cases are distinguishable. In *United Nuclear Corp. v. United States,* 912 F.2d 1432 (Fed.Cir.1990), United, a uranium mining company, had a mining lease on Navajo land and submitted a mining plan to the Secretary of the Interior for approval. The Secretary, however, refused to approve the mining plan until the Navajo Tribal Council approved the plan, and the Council declined to do so without the payment of additional funds to the Tribe. The mining leases expired without United having been able to conduct any mining. United then brought an action against the government, arguing that the Secretary's refusal to approve the mining plan constituted a compensable taking. Because United had a leasehold interest in the minerals to be mined, *see* 912 F.2d at 1437, there was no question that it had a property interest that was directly affected by the government's action. The question before the court was whether the government's action constituted a taking of that property interest. The court held that it did.

The court in *United Nuclear* noted that the economic impact of the Secretary's action was to cause United to lose not only all of its investment in the mining operation, but also all of its prospects for profit. 912 F.2d at 1435-36. The court further held that the Secretary's refusal to approve the mining plan "seriously interfered with United's investment-backed expectations by destroying them." *Id.* at 1437. And in assessing the character of the government's action, the court stated that "[t]he record leaves no doubt that the real reason for the Tribe's refusal to approve United's mining plan was an attempt to obtain substantial additional money from United." *Id.* The Secretary's action, according to the court, "reflects . . . an attempt to enable the Tribe to exact additional money from a company with whom it had a valid contract." *Id.* at 1438. Accordingly, the court held that the Secretary's action had taken United's leases and that United was entitled to compensation.

The difference between that case and this one is dramatic. The Secretary's action in *United Nuclear* effectively terminated a recognized real property interest-United's mining leases. *United Nuclear* was not a case in which a regulation of other property made United's mining operation more difficult or more expensive. Because there is no such direct restraint on any property interest held by the plaintiffs in this case, *United Nuclear* is of no assistance to them.

The second of the two cases on which the plaintiffs place their main reliance is *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir.2003). In that case a

takings claim was brought by real estate owner-developers who had entered into a federal program to construct and operate low-income housing projects. As part of the program, the owners financed the construction of the low-income housing projects with federally guaranteed mortgage loans. Consistent with federal regulations and the owners' agreements with the government, the mortgage contracts provided that the owners could prepay their 40-year mortgages after 20 years. After most of the 20-year period had expired, Congress became concerned that the owners would exercise their prepayment rights and remove the projects from the low-income housing market. Accordingly, Congress enacted legislation that nullified the prepayment provision of the contracts. The result of the legislation was that the owners could not "regain normal rights of ownership" and had to remain in the government-regulated low-income housing program. *Id.* at 1327.

Under those circumstances, this court held that Congress's actions constituted a taking of the owners' property for which compensation had to be paid. The "distinct property interest" that was taken in *Cienega Gardens* was the developers' "real property rights to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years." 331 F.3d at 1328. The owners gave up certain rights during the first 20 years of their mortgages, but had retained the right to regain their full ownership rights after that period by prepaying the mortgages. *Id.* at 1329. The court ruled that by enacting legislation

that barred the developers from exercising their options to prepay their mortgages, Congress had in effect requisitioned the developers' property for up to 20 more years of service as low-income housing. Although the relationship between the government, the mortgagees, and the developers was governed by a complex web of contracts, statutes, and regulations, the court viewed the challenged legislation as having appropriated a real property right that the developers enjoyed before the legislation but not afterwards. In essence, the court held, the statutes authorized what amounted to a traditional appropriation of real property rights, just as if the government had ordered the owners to continue devoting their properties to low-income housing use after their contractual obligation to do so had expired. By altering the regulatory agreements as they applied to the owners, the government ultimately extended an encumbrance upon the owners' rights to use their property beyond the 20-year burden they had bargained for. The court characterized that alteration as a taking.[2]

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2. In a subsequent appeal addressing the rights of different parties, this court held that the earlier *Cienega Gardens* decision did not have the effect of resolving the takings issue for all other similarly situated plaintiffs. *See Cienega Gardens v. United States*, 503 F.3d 1266 (Fed.Cir.2007). The court in that case ruled that before concluding that a compensable taking of those parties' property had occurred, the trial court needed to consider the effect of the subject legislation on the property as a whole, the offsetting benefits provided by that legislation, the duration of the legislation, and whether the private parties had a reasonable, investment-backed expectation that they would have the option to repay their mortgages after 20 years. *See St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1386 n. 5 (Fed.Cir.2008).

The plaintiffs here have not alleged that the government has altered their contract rights in a way that affects their underlying property rights, as in *United Nuclear* and *Cienega Gardens*. They also have not alleged that the government has stepped into the shoes of a contracting party so as to appropriate that party's contract rights, as the Supreme Court discussed in Omnia and *Brooks-Scanlon*. Instead, the plaintiffs rely on *United Nuclear* and *Cienega Gardens* principally to support their argument that a taking has occurred in this case because the government "targeted" their contract rights in order to promote the interests of another party, The Nature Conservancy. To be sure, once it is established that a recognized property interest has been affected by governmental regulation, governmental "targeting" may make it more likely that the destruction of property rights will be regarded as appropriative, rather than merely the incidental effect of lawful regulation directed at a different purpose. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (referring to regulation that "single[s] out" and "burden[s]" the owner of property). In *Cienega Gardens*, for example, it was important that the statutes in question "intentionally defeated the Owners' real property rights to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years." 331 F.3d at 1328. If the owners had been prevented from prepaying their mortgages as a result of a change in their economic circumstances flowing from unrelated, general changes in the tax code, for example, it is far less likely that the court would have found the

governmental action to constitute a compensable taking. But the fact that the government regulates in response to a particular party's conduct or the conduct of a group of which the party is a member is not enough even to trigger an inquiry into whether the government's conduct constitutes a taking unless the government's action interferes with some recognized property right enjoyed by that party.

The plaintiffs' "targeting" argument runs afoul of well-settled case law, as reflected in several decisions from the Supreme Court and this court. In *Omnia*, for example, the United States requisitioned the steel company's entire production of steel plate for the year 1918 and "directed that company not to comply with the terms of [Omnia's] contract." 261 U.S. at 507, 43 S.Ct. 437. Notwithstanding that the government's action was specifically directed at Omnia, the Court held that the destruction of the contract did not constitute a compensable taking within the meaning of the Fifth Amendment.

Similarly, in *Huntleigh*, 525 F.3d 1370, Congress's decision to substitute the Transportation Security Administration for the private airport screening companies clearly targeted the private companies in that the legislation was designed to replace their contract services with services performed by federal agents. Yet the fact that the legislation was specifically directed at replacing the private companies did not affect the court's conclusion that there was no taking. And in *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed.Cir.1993),

the court held that a prohibition on the importation of assault rifles did not constitute a compensable taking of the plaintiff's contracts to purchase such rifles for importation, even though the prohibition was directly targeted at importers of assault rifles, such as the plaintiff.

The problem with the plaintiffs' takings theory in this case, as well as their claim that "targeting" converted an otherwise innocuous regulation into a compensable taking, can be illustrated by a hypothetical case that contains all the essential elements of this case without the complicating details that tend to obscure the analysis. Suppose that a business that offers "outdoor adventures" obtains rights from a private party to build a facility next to a federally owned national wilderness area for the purpose of attracting adventurers who are interested in hiking in the wilderness area. Suppose further that the government, being concerned that the influx of large numbers of hikers will disrupt the wilderness area, closes the wilderness area to all hikers or strictly limits the number of hikers who can enter the area. In that event, no property right of the business has been taken, even if the government acted in direct response to the prospect of having a hiking tourism business next to the wilderness area. To be sure, the expectation of the outdoor adventure company has been disappointed, but it is not an expectation that was based on any property right that was taken, and thus the government did not effect a taking for which compensation must be paid. While it might be different if the government regulated

activities on a private individual's property—in the example, if the government were to prohibit private landowners from running a hiking business within 20 miles of a wilderness area—that is another matter altogether from the government regulating activities on its own property, or property over which it has full control, even if that regulatory action disappoints the expectations of nearby property owners. Accordingly, even if the Interior Department regulation in this case is regarded as "targeted" at the plaintiffs, it regulated conduct as to which they had no protectable property interest, and it therefore did not constitute a taking for which compensation had to be paid.

III

There are two remaining issues that must be resolved. First, at oral argument, the plaintiffs asserted that the Interior Department regulation would interfere with their right to use the pier on Palmyra. In the trial court, however, the plaintiffs asserted that the government's regulation did not affect activities on the "emergent lands or fixtures appurtenant thereto." Because the question of the use of the pier does not appear to have been put into issue in the trial court, we have no reason to consider it here. Certainly there is nothing on the face of the regulation that suggests any restriction on the use of the pier, and if the plaintiffs were concerned about the use of the pier they could have obtained clarification as to the application of the regulation in that respect.

Second, the plaintiffs have raised a question as to whether the regulation affects the right of their fishing vessels to traverse the 12-mile zone surrounding Palmyra that is governed by the Interior Department regulation. In their complaint, the plaintiffs alleged that the Interior Department regulation "restricted public access to Palmyra . . . thereby barring Plaintiffs from entering Palmyra." The plaintiffs have not spelled out the property interest underlying that assertion in any detail. However, it can be interpreted as a claim that the government has denied them an easement of necessity relating to their contract-based interests on Palmyra.

An easement of necessity has been recognized as a compensable property interest. For example, in *Bydlon v. United States*, 146 Ct.Cl. 764, 175 F.Supp. 891, 896 (1959), our predecessor court considered whether a Presidential Executive Order that prevented owners of remote resorts within a national forest from enjoying reasonable access to their properties constituted a taking. In light of the "traditional doctrine of ways of necessity," the court observed that there is a general rule that the owners of property enjoy a right of reasonable access to their property. *Id.* at 897-98. While the owners retained a method of access "using wilderness trails and waters by packhorses, canoes, and walking," the court determined that "such a method of access would be unreasonable and would destroy [plaintiff's] property for resort purposes" as "[t]he resort was planned exclusively with air access in mind." *Id.* The court thus concluded that "the United States has taken,

under the guise of its police power, a property right of the plaintiffs . . . consisting of a way of necessity to their properties." *Id.* at 900.

Our predecessor court applied the doctrine of necessity to another takings claim some years later, this time with respect to access to an island. *See Laney v. United States*, 228 Ct.Cl. 519, 661 F.2d 145 (1981). The court described the facts in that case as concerning "an effort by the government to utilize its control over navigable waters to deny any meaningful access to the island whatsoever. The government's purpose appears to be, or may be, to keep it in its pristine state." *Id.* at 146. In that case, the government had argued that its authority to regulate activities on the water allowed it to prohibit transit over the water to the island. *Id.* at 147-48. The court rejected that assertion, noting:

> If defendant is correct, the just compensation clause of the fifth amendment has but little effect in protecting island property. Defendant is free to add islands to its system of parks, national seashores, recreational areas, and wildlife preserves, without cost to it. We could enter summary judgment for defendant solely on the admitted fact that the property allegedly taken is an island.

Id. at 148. The court noted the parallel between an island and a city block surrounded by public streets. In the latter case, the court explained, "if his access to his block on all four sides is cut off, that is a taking, and if

authorized is compensable under the just compensation clause." *Id.* at 149. In light of those precedents, a regulation that prevents a property owner from accessing private property would implicate a cognizable property interest for purposes of the Fifth Amendment.

In this case, the government responded to the plaintiffs' claim by arguing in the trial court that "[t]he plain language of the notice does not prohibit plaintiffs' ships from approaching Palmyra, and the plaintiffs have not alleged or provided evidence that even one of their ships was ever turned away from the refuge." The plaintiffs did not contest that assertion or otherwise offer anything to suggest that the Interior Department had interpreted the regulation to prohibit access by fishing vessels to the plaintiffs' facilities on Palmyra. There is nothing in the regulation that by its terms restricts the plaintiffs' right to cross the refuge to reach their base of operation on the island. Absent any reason to believe the government interpreted the regulation to bar the plaintiffs from reaching their facilities, they have failed to make a sufficient allegation that the government has taken that right. We therefore have no occasion to decide whether the plaintiffs' contract rights with regard to activities on the island carried with them the right of access to the island and whether a restriction on such access would have constituted a compensable taking.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED JANUARY 22, 2008

UNITED STATES COURT OF FEDERAL CLAIMS

No. 07-35L.

Jan. 22, 2008.

PALMYRA PACIFIC SEAFOODS, L.L.C., Palmyra Pacific Enterprises, L.L.C., PPE Limited Partnership, and Frank Sorba,

Plaintiffs,

v.

The UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

This case is before the court after argument and supplemental briefing on defendant's motion to dismiss for failure to state a claim upon which relief can be granted or, in the alternative, its motion for summary judgment. Defendant contends that plaintiffs have no compensable property interest that could have been taken by lawful action of the Federal Government. The issue for decision is whether the Government, working

in tandem with an influential environmental lobby, appropriated plaintiffs' property interest by prohibiting plaintiffs from commercial fishing off-island, which had the effect of rendering worthless plaintiffs' licenses for an on-island facility to support commercial fishing.

FACTS

The following facts are drawn from the complaint or are neutral facts that are neither disputed nor relied upon for decision. Palmyra Atoll ("Palmyra") and Kingman Reef are territories of the United States located approximately 1,000 nautical miles south of Hawaii and thirty-three nautical miles apart from each other. Palmyra and Kingman Reef are surrounded by a 200-nautical mile United States Exclusive Economic Zone ("EEZ") that excludes foreign fishing vessels. During World War II, the President of the United States issued an Executive Order establishing a Naval Defensive Sea Area and Naval Airspace Reservation over the territorial waters from the high-water mark out to a three-mile boundary surrounding Palmyra. Exec. Order No. 8682, 6 Fed.Reg. 1015 (Feb. 14, 1941), *discontinued by* Exec. Order No. 9881, 3 C.F.R. 662 (1943-1948). The United States at that time established a naval base on Palmyra, including an airstrip, dock, harbor, and base camp. On August 25, 2000, the Navy transferred custody of the Kingman Reef and surrounding reefs to the Department of the Interior ("Interior"), pursuant to the Federal Property and Administrative Services Act. Def.'s Br. filed July, 13, 2007, Ex. C.

Appendix B

Until a late 2000 sale to The Nature Conservancy, the Fullard-Leo family held title to the emergent land of Palmyra. Prior to July 1, 1999, the Fullard-Leo family assigned to Palmyra Development Co., Inc. ("PDC"), certain rights to Palmyra, including the right to convey an exclusive license to establish commercial fishing operations on Palmyra and to use the Palmyra airstrip, dock, harbor, and base camp for commercial fishing operations. On July 1, 1999, PDC entered into a license agreement with Palmyra Pacific Enterprises, L.L.C. ("PPE"), granting PPE the exclusive right to establish a commercial fishing operation on Palmyra and to use the airstrip, dock, harbor, and base camp for its operations. On November 17, 2000, PDC and the Fullard-Leo family executed a written consent allowing PPE to assign its rights under the license to PPE Limited Partnership ("PPELP") and allowing PPELP to sublicense its rights to Palmyra Pacific Seafoods, L.L.C. ("PPS"). In 2000, pursuant to its sublicense, PPS made substantial economic investments toward establishing, developing, and operating a commercial fishing enterprise on Palmyra by improving real property, buildings, and facilities and commencing commercial fishing in the EEZ.[1]

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1. During oral argument counsel for plaintiffs impressed upon the court the extensive time, energy, and economic investments made in preparing Palmyra for what promised to be a lucrative commercial fishing operation. The court reads the allegations of plaintiffs' complaint to embrace the assertion of fact that "[t]his was not a gleam in Mr. [Frank] Sorba's eye. This was millions of dollars of capital invested. . . ." Transcript of Proceedings, *Palmyra Pacific Seafoods, L.L.C., et al. v. United States*, No. 07-35L, at 22 (Fed.Cl. Oct. 22, 2007).

Appendix B

On January 18, 2001, the Secretary of Interior signed Order No. 3224, designating as a National Wildlife Refuge the tidal lands, submerged lands, and waters out to a twelve-nautical mile distance surrounding Palmyra, and Order No. 3223, designating as a National Wildlife Refuge Kingman Reef and surrounding submerged lands and waters out to a distance of twelve nautical miles. *See* Am. Compl. filed Apr. 13, 2007, Exs. G, I. On January 24, 2001, Interior published regulations closing Palmyra and Kingman Reef to commercial fishing. 66 Fed.Reg. 7660-02 (Jan. 24, 2001). In 2003 The Nature Conservancy conveyed 416 acres of the emergent land of Palmyra to the United States to be included in the refuge. In September 2006 The Nature Conservancy conveyed an additional 28 acres for inclusion in the refuge.

Plaintiffs PPS, PPE, and PPELP complain that these wildlife refuge designations and accompanying regulations issued by Interior have "directly confiscated, taken, and rendered wholly and completely worthless" plaintiffs' property interests "embodied and reflected in the Palmyra License and the Palmyra Sublicense" (collectively, the "licenses"). Am. Compl. ¶ 37. Specifically, plaintiffs charge that "[t]he prohibition on public access and on commercial fishing resulting from the Palmyra Designation, the Kingman Designation and the related regulations rendered worthless Plaintiffs' property interests in (i) the Palmyra License, (ii) the Palmyra Sublicense, (iii) the improvements Plaintiffs made to the commercial fishing facilities on Palmyra, and (iv) Plaintiffs' commercial fishing enterprise" taking

"valuable property interests of the Plaintiffs for a public use without payment of just compensation." *Id.* ¶¶ 38, 39. Plaintiffs allege both a categorical and regulatory taking. *Id.* ¶¶ 47, 52.

By order entered on October 4, 2007,[2] the court directed that the parties to argue the applicability of *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed.Cir.2005); and *Huntleigh USA Corp. v. United States*, 75 Fed.Cl. 642 (2007). Briefing concluded on October 19, 2007. Argument was held October 22, 2007. Following argument, the court ordered supplemental briefing to allow the parties to address the applicability of new cases discussed by plaintiffs during oral argument. Supplemental briefing was completed on November 9, 2007.

DISCUSSION

1. *Standard of review*

In considering a motion to dismiss filed pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief can be granted, the court's task is not to determine whether a plaintiff will ultimately prevail, but " 'whether the claimant is entitled to offer evidence to support the claims.' " *Chapman Law Firm Co. v. Greenleaf Constr.*

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2. The case was transferred to this judge on September 6, 2007.

Co., 490 F.3d 934, 938 (Fed.Cir.2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). In *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court clarified the standard enunciated in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), with respect to what a plaintiff must plead to survive a Rule 12(b)(6) motion.[3] The Supreme Court circumscribed the standard, stating: " '[A]ny statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.' " *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n. 4 (Fed.Cir.2007) (quoting *Bell Atl. Corp.*, 127 S.Ct. at 1968). Accordingly, the court must assess whether plaintiffs adequately have stated a takings claim and whether plaintiffs can allege any facts that, if proven, would entitle them to the relief sought. *See Bell Atl. Corp.*, 127 S.Ct. at 1968-69; *McZeal*, 501 F.3d at 1361-62. Although plaintiffs' factual allegations need not be "detailed," they "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if

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3. The *Conley* standard, abrogated by *Bell Atlantic*, stated "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46, 78 S.Ct. 99. *Bell Atlantic* retired the literal interpretation of *Conley's* "no set of facts" language "as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp.*, 127 S.Ct. at 1969.

doubtful in fact)." *Bell Atl. Corp.*, 127 S.Ct. at 1964-65 (internal citation omitted). The court thus " 'accept[s] as true all factual allegations in the complaint, and . . . indulge[s] all reasonable inferences in favor of the nonmovant,' " to evaluate whether plaintiffs have stated a claim upon which relief can be granted. *Chapman Law Firm*, 490 F.3d at 938 (omission in original) (quoting *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed.Cir.2001)).

2. *Plaintiffs' takings claim*

The takings clause of the Fifth Amendment enshrines the ownership of property by providing, in pertinent part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The purpose of the Takings Clause is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212 (Fed.Cir.2005) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). The court evaluates whether a takings claim has been stated under a two-part test. First, the court must determine whether plaintiffs have established a property interest for purposes of the Fifth Amendment. *Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 (Fed.Cir.2006). The Fifth Amendment does not create or define the scope of a property interest, so the court must look to existing rules and background principles derived from state, federal, or common law to ascertain

whether plaintiffs have asserted a cognizable property interest. *Id.* at 806-07. Second, once a property interest is identified, the court must determine whether the governmental action at issue amounts to a compensable taking of that property. *Air Pegasus*, 424 F.3d at 1213. The Supreme Court has determined that government action constitutes a compensable taking when a physical invasion or appropriation of private property occurs, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), or when a government regulation "goes too far" and unduly burdens private property. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). This latter class of "regulatory takings" is subdivided further into categorical and non-categorical takings. *See Air Pegasus*, 424 F.3d at 1213 n. 3.[4]

Plaintiffs assert a property interest in "a series of contractual licenses grant[ing] Plaintiffs the right to use

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4. A categorical regulatory taking occurs when a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (emphasis and second alteration in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). Non-categorical regulatory takings are governed by the ad hoc, factual inquiries set forth in *Penn Central*, which require the court to evaluate the " 'economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' . . . [And] the 'character of the governmental action'. . . ." *Id.* at 538-39, 125 S.Ct. 2074 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124, 98 S.Ct. 2646).

Palmyra for commercial fishing and related transport and support operations." Pls.' Br. filed Aug. 10, 2007, at 3 (internal quotation marks omitted). Plaintiffs contend that the licenses are private, exclusive, transferrable contract rights that qualify as property interests protected by the Fifth Amendment. In support of the proposition that contract rights are property interests protected by the Fifth Amendment, plaintiffs rely on *Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."); *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 19 n. 16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); and *Cienega Gardens v. United States,* 331 F.3d 1319, 1329 (Fed.Cir.2003) ("[T]here is also ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment.").

Defendant contends that plaintiffs' licenses are not cognizable Fifth Amendment property interests, but, rather, mere licenses. Defendant points to a line of cases beginning with *United States v. Fuller,* 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973), where the Supreme Court held, in an eminent domain action, that the Fifth Amendment does not require the Government to compensate for that element of value based on the use of the condemned land in combination with government-issued revocable grazing permits. In *Alves v. United States*, the United States Court of Appeals for the

Federal Circuit ruled that, under the Supreme Court's reasoning in *Fuller*, government-issued grazing permits and preferences do not constitute compensable property interests at all because they are governmentally created rights appurtenant to the fee. 133 F.3d 1454, 1457 (Fed.Cir.1998). This reasoning was extended to conclude that government-issued fishing licenses did not constitute cognizable property interests under the Fifth Amendment in *Conti v. United States*, 291 F.3d 1334, 1341-42 (Fed.Cir.2002) (holding government-issued swordfishing permit did not constitute compensable property interest, but was "revocable license," because plaintiff could not assign, sell, or transfer permit, permit did not confer exclusive right to fish, and Government retained right to revoke, suspend or modify permit at any time), and *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1374 (Fed.Cir.2004) (holding plaintiff did not have Fifth Amendment property interest in government-issued fishery permit that was not transferrable, exclusive, or irrevocable). Defendant asserts that this line of cases shows that "Plaintiffs' license does not convey the essential 'stick in the bundle' that would establish a property interest." Def.'s Br. filed July 13, 2007, at 13 (quoting *Conti*, 291 F.3d at 1340).

Plaintiffs distinguish the cases cited by defendant as dealing with government-granted, non-transferrable, non-exclusive permits and licenses that do not control the status of plaintiffs' private licenses as a cognizable property interest. Plaintiffs counter with the decisions of the United States Court of Claims in *Jackson v.*

United States, 122 Ct.Cl. 197, 103 F.Supp. 1019 (1952), and *Todd v. United States*, 155 Ct.Cl. 87, 292 F.2d 841 (1961), holding that a plaintiff's transferrable, government-issued fishing license was a "sort of property right" that the Government was liable for taking when the military prohibited plaintiff from entering the grounds upon which plaintiff had been licensed to fish. *Jackson*, 103 F.Supp. at 1020; *see also Todd*, 292 F.2d at 845 (agreeing, by way of dictum, that Government is "equitably liable" for taking of fishing permit under substantially same facts as those in *Jackson*). *But see Conti*, 291 F.3d at 1342 n. 7 (noting that "both *Todd* and *Jackson* were decided before *Fuller*. We do not need to address here whether they remain viable after *Fuller*.").

Despite plaintiffs' disagreement with the applicability of *American Pelagic*, *Conti*, *Alves*, and *Fuller*, both plaintiffs and defendant appear to agree that whether plaintiffs' licenses constitute a compensable property interest at all turns on whether the private licenses were transferrable, exclusive, and irrevocable. *See* Pls.' Br. filed Aug. 10, 2007, at 6-9; Def.'s Br. filed Sept. 5, 2007, at 2-7. This question remains arguable and potentially the subject of a factual dispute; however, the materiality of that dispute—and the issue before the court—turns on whether plaintiffs possessed a legally protected property interest that actually was the subject of the alleged taking. *Air Pegasus*, 424 F.3d at 1215 ("As an initial matter, a claimant seeking compensation from the government for an alleged taking of private property must, at a minimum, assert

that *its* property interest was actually taken by the government action.").[5]

The case at bar is analogous to the binding precedent in *Colvin Cattle,* 468 F.3d 803, where plaintiff claimed that the Government had taken its private property interests in a ranch and water rights after the Government cancelled plaintiff's term grazing permit in an adjacent allotment. Relying on the Supreme Court decision in *Fuller,* 409 U.S. at 493, 93 S.Ct. 801, the Federal Circuit held that no taking had occurred. The court determined: "That the ranch may have lost value by virtue of losing the grazing lease is of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest." *Colvin Cattle,* 468 F.3d at 808. Similarly, here, plaintiffs posit that the Government's closure of the waters surrounding Palmyra to commercial fishing has rendered worthless

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5. Defendant also argues that plaintiffs have failed to state a claim upon which relief can be granted because "even if a taking occurred as Plaintiffs allege, such a taking would have triggered section 7.01 [a termination upon taking of Property provision] of the license, and the license would have 'at once ceased and terminated.' " Def.'s Br. filed Sept. 5, 2007, at 13 (quoting Am. Compl. Ex. A at 33-34). Plaintiffs rejoin that "defendant's assertion is not correct; correspondence exchanged in 2004 in the ordinary course of business between Plaintiffs and their licensor establishes that neither party believed the license had terminated in 2001." Pls.' Br. filed Sept. 25, 2007, at 2. Although this disagreement manifests a factual dispute between the parties, the dispute is immaterial to resolution of the dispositive issue.

plaintiffs' property interest in the private licenses that permitted plaintiffs to use the lands of Palmyra to establish a commercial fishing operation. Plaintiffs, however, expressly disavow any claim of a property interest in the "tidal lands, submerged lands, or surrounding waters" of Palmyra. Pls.' Br. filed Aug. 10, 2007, at 12 ("Indeed, the defendant correctly notes that the interests in Palmyra of the Fullard-Leo family (the ultimate source of Plaintiffs' license rights) extended only to 'emergent land.' Accordingly, the FullardLeo's lacked authority to grant any license in the tidal lands, submerged lands, or surrounding waters, and the government could not have taken any tidal lands, submerged lands, or surrounding waters."). As plaintiffs admit, the governmental restrictions designating the refuge and closing it off to commercial fishing were imposed upon the "tidal lands, submerged lands, and waters" of Palmyra—the interests to which plaintiffs disavow any claim. *Id.* ("[W]hen the government designated the Palmyra National Wildlife Refuge, '[t]he refuge consisted of tidal lands, submerged lands, and waters'—*not* emergent land . . . ." (second alteration in original)). Therefore, as in *Colvin Cattle*, that plaintiffs' property interest in the licenses has lost value by virtue of the loss of commercial fishing access to the waters surrounding Palmyra is of no moment, because such loss in value was not occasioned by governmental restrictions on a constitutionally cognizable property interest possessed by plaintiffs. No taking of plaintiffs' property interest in their licenses occurred upon the Government's declaration of the Palmyra National Wildlife Refuge and subsequent closure of the refuge to commercial fishing.

Appendix B

What plaintiffs complain of amounts, at most, to a frustration of purpose, rather than a taking of plaintiffs' commercial fishing licenses. A similar claim was rejected by the Supreme Court in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923). In *Omnia* plaintiff possessed a contractual right to purchase a large quantity of steel from the Allegheny Steel Company at a low fixed price. Prior to any deliveries, the Government requisitioned Allegheny Steel Company's entire production of steel plate for the year 1918 and directed the company not to fulfill its contract with plaintiff. Plaintiff sued in the Court of Claims claiming that government actions had effected a taking for public use of its property in the contract. Acknowledging that plaintiff had a property interest in its contract, *id.* at 508, 43 S.Ct. 437 ("The contract in question was property within the meaning of the Fifth Amendment . . . ."), the Supreme Court nonetheless held that plaintiff's loss was merely "consequential" and one for which takings law afforded no remedy. *Id.* at 510, 43 S.Ct. 437 ("If, under any power, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable."). The Court characterized plaintiff's claim as "confound[ing] the contract with its subject-matter," and pointed out that the Government neither acquired the contract nor took away the right to enforce it. *Id.* at 510-11, 513, 43 S.Ct. 437 ("In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government."). As a consequence, the Supreme Court rejected plaintiff's takings claim,

holding that "[f]rustration and appropriation are essentially different things." *Id.* at 513, 43 S.Ct. 437.

The Federal Circuit in *Air Pegasus* applied the *Omnia* precedent to a claim brought by a heliport operator following implementation of Federal Aviation Administration (the "FAA") post-9/11 regulations that precluded use of plaintiff's leased property as a heliport, the only use permitted under the subject lease. The Federal Circuit determined that plaintiff's complaint sought compensation for a "derivative injury." *Air Pegasus,* 424 F.3d at 1215 (noting that regulations prohibited operation of helicopters, of which plaintiff owned none, so plaintiff's "economic injury is not the result of the government taking [plaintiff's] property, but is the more attenuated result of the government's purported taking of other people's property"). Applying *Omnia,* the Federal Circuit agreed that plaintiff possessed a property interest in its leasehold, but explained that the FAA's restrictions did not regulate plaintiff's operations under its lease. *Id.* at 1216. Instead, the court held that the actions of the FAA "frustrated [plaintiff's] business expectations. . . . Therefore, like the appellant in *Omnia*, [plaintiff], while no doubt injured by reason of the government's actions, has not alleged a taking of private property under the Fifth Amendment." *Id.*

As in *Omnia* and *Air Pegasus,* plaintiffs' complaint conflates the licenses with their subject matter. The licenses permit plaintiffs to use the emergent land of Palmyra for the purpose of establishing a commercial

fishing operation. The Government's closure of the waters surrounding Palmyra to commercial fishing frustrated the purpose of the licenses, but did not appropriate a contractual right to commercial fishing granted thereby, as such a right could not have been granted. The Government is not liable to plaintiffs for a taking because the government actions at issue did not address plaintiffs or their licensors or regulate plaintiffs' operations under their licenses. The designation of the Palmyra National Wildlife Refuge and subsequent closure of the refuge to commercial fishing neither appropriated plaintiffs' contract rights for public use nor removed plaintiffs' right to enforce their contractual licenses or to seek a contractual remedy with their licensors.

3. *Applicability of Cienega Gardens v. United States*

Plaintiffs rely heavily on *Cienega Gardens*, 331 F.3d 1319,[6] to refute the argument that the governmental action represents a frustration of purpose and does not constitute a taking. In *Cienega Gardens* the Federal Circuit held that the Government effected a taking of plaintiffs' private contractual pre-payment rights when Congress legislatively abrogated those rights. In the circumstances of the case, the Federal Circuit deemed

6. *Cienega Gardens v. United States*, 503 F.3d 1266, 1275 (Fed.Cir.2007), refers to the decision rendered in *Cienega Gardens*, 331 F.3d 1319, as "*Cienega VIII*" and notes that the decision only resolved takings liability as to the four model plaintiffs in that case.

application of the principles from *Omnia* "inapt." *Id.* at 1335. The court held that "[t]he proposition in *Omnia* about consequential loss or injury refers to legislation targeted at some public benefit, which incidentally affects contract rights, not, as in this case, legislation aimed at the contract rights themselves in order to nullify them." *Id.* The court remarked:

> The enactment of [the legislation eliminating pre-payment rights] directly and intentionally abrogated the contracts. The effect on the contracts is, therefore, not merely consequential. Where Congress' actions have the effect of "keep[ing] [the contract] alive for the use of the government" rather than "bring[ing] the contract to an end," a court should conclude that there *has* been a taking. *Cf. Omnia*, 261 U.S. at 513, 43 S.Ct. 437, 67 L.Ed. 773. *Id.* (alterations in original).

Plaintiffs have submitted several documents that, they argue, "establish that the government's actions in establishing the Palmyra National Wildlife Refuge and 'clos[ing] the refuge to commercial fishing' were 'aimed [directly] at [plaintiffs'] contract rights themselves in order to nullify them.' " Pls.' Br. filed Oct. 18, 2007, at 2 (alterations in original) (internal footnotes and citations omitted). The first document is a July 17, 2000 email from Justin Johnson to Tim Elliott and Joseph McDermott at Interior. The e-mail discusses a collaboration between the Fish and Wildlife Service (the "FWS") and a private entity, The Nature Conservancy,

in creating a nature preserve at Palmyra. The e-mail discusses plaintiffs' fishing permit and warns that plaintiff Frank Sorba, "is heading to Palmyra now."

A series of internal government e-mails begins with a July 25, 2000 e-mail from United States Coast Guard Lieutenant Mark Murakami to Mr. McDermott, forwarding a report compiled by a Coast Guard boarding officer who had visited Palmyra in early July 2000. The e-mail discusses The Nature Conservancy's planned development of an "eco-tourism camp," which had already hosted twelve "Washington politicians and prominent Fortune 500 business owners" for five days at a price of $5,000.00 each. The report discusses plaintiffs' licenses and their intended development of commercial fishing operations. The final part of the report sets forth "major concerns by Mr. [Steve] Barclay," the on-scene manager for The Nature Conservancy and previous employee of the FWS: "Mr. Barclay feels eco-tourism and nature preservative agenda will conflict with [plaintiffs'] fishing fleet/ industry. Major concerns of pollution and impact to lagoon and island environment." The next in the series of e-mails regarding the boarding officer's report, also transmitted on July 25, 2000, are between Mr. McDermott and Sandra King at Interior. Ms. King, upon being forwarded the report writes: "Jooeeeee!!! What is this? ? ? ? Who do we need to beat up? ?:—)" Mr. McDermott responds, "You are probably upset by Section C [of the boarding officer's report] and Frank Sorba's plans. So are we. . . ." Plaintiffs proffer that they "have uncovered additional publicly available

documents showing that the government was (and is) working 'cooperatively' in a 'partnership' with [The Nature Conservancy]." Pls.' Br. filed Nov. 9, 2007, at 1.

Plaintiffs characterize these documents as revealing "an intent to 'beat up' on plaintiffs to favor a competing commercial enterprise," and argue that, at a minimum, they present a genuine dispute of fact on the issue of whether the Government's actions were " 'aimed at the contract rights themselves in order to nullify them.' " *Id.* (quoting *Cienega Gardens*, 331 F.3d at 1335). The court is troubled by the inappropriate relationship that these documents portray. But, despite the inappropriateness of the Government's apparent motivation that these documents disclose, plaintiffs misapprehend the import of *Cienega Gardens* to this case.

Plaintiffs argue that the motivations of the Government control the *Cienega Gardens* inquiry into whether government actions targeted plaintiffs' contract rights in order to nullify them, thus warranting a departure from the rule of *Omnia* and *Air Pegasus*. The language employed by the Federal Circuit in *Cienega Gardens*, however, belies the construction that plaintiffs give it. The legislation involved in *Cienega Gardens* was "aimed at the contract rights themselves in order to nullify them," not only in motivation but in structure and form. *Cienega Gardens*, 331 F.3d at 1335. This distinction is made apparent by contrasting the facts presented in *Cienega Gardens* and those involved in *Omnia:* "Moreover, in this case it was the contract

rights, not as in *Omnia*, the subject matter of the contract that was taken." *Cienega Gardens*, 331 F.3d at 1335 n. 29 (citation omitted). The statute in *Cienega Gardens* directly acted upon and abrogated the contract rights themselves, but the same characterization cannot be ascribed to the government actions in *Omnia* and in this case, which regulated only the subject matter of the respective contracts—the steel production and the commercial fishing activities.

Other language from the Federal Circuit's opinion in *Cienega Gardens* is conclusive: "Where Congress' actions have the effect of 'keep[ing] [the contract] alive for the use of the government' rather than 'bring[ing] the contract to an end,' a court should conclude that there *has* been a taking." *Id.* at 1335 (quoting *Omnia*, 261 U.S. at 513, 43 S.Ct. 437). Plainly, this distinction between the facts of *Cienega Gardens* and those of *Omnia* does not hold true for plaintiffs. Plaintiffs have not, and cannot, allege that the Government has appropriated the benefits of plaintiffs' licenses for itself or has sought to step into the shoes of plaintiffs as licensees to establish Interior's own commercial fishing operation. Plaintiffs' licenses have been "[brought] to an end," not kept alive for the benefit of the Government in the same manner as the contract at issue in *Omnia*: "[T]he performance of the contract was rendered impossible. It was not appropriated, but ended." *Omnia*, 261 U.S. at 511, 513, 43 S.Ct. 437. The doctrine of frustration is the correct theory under which plaintiffs complain. "Frustration and appropriation are essentially different things." *Id.* at 513, 43 S.Ct. 437.

4. *Plaintiffs' arguments raised in supplemental briefing*

Plaintiffs' recent efforts to distinguish *Omnia*, and *Air Pegasus*[7] are unpersuasive. They argue that *Omnia*, and the line of cases that apply its principles, "all involved the government's exercise of its broad power to protect national security and to implement foreign policy." Pls.' Br. filed Nov. 9, 2007, at 2. Based on the Federal Circuit's decision in *Paradissiotis v. United States*, 304 F.3d 1271 (Fed.Cir.2002), plaintiffs take the position that "such decisions are *sui generis* and do not establish generally applicable takings law." Pls.' Br. filed Nov. 9, 2007, at 2. The Federal Circuit announced in

7. Plaintiffs distinguish *Air Pegasus* on the ground that the plaintiff in that case did not own the property that was taken. Pls.' Br. filed Nov. 9, 2007, at 3-4 (citing *Air Pegasus*, 424 F.3d at 1215 ("Air Pegasus's economic injury is not the result of the government taking Air Pegasus's property, but is the more attenuated result of the government's purported taking of other people's property."')). In contrast to *Air Pegasus*, plaintiffs assert that they own the property underlying their claim, because "the contract was the property, and plaintiffs' rights had fully vested prior to the taking." *Id.* at 4. Plaintiffs continue to ignore the distinction between the subject of the contract and the contract itself. The government action that plaintiffs allege took their licenses in the case at bar was the closing of the refuge to commercial fishing—the subject of the licenses, not a right granted therein. *See supra* pp. 7-8. Plaintiffs do not allege that the government action operated to acquire the licenses for the benefit of the Government or took over for the Government plaintiffs' right to enforce the licenses. *See Omnia*, 261 U.S. at 510-11, 43 S.Ct. 437; discussion *supra* p. 11.

Paradissiotis, explicating *Omnia*, that "valid regulatory measures taken to serve substantial national security interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for Fifth Amendment purposes." *Paradissiotis*, 304 F.3d at 1275. Plaintiffs do not succeed in their attempt to transmute this descriptive gloss into a general pronouncement Supreme Court's sound reasoning in *Omnia* itself was not dependent upon the national security concerns characterizing the Government's action; in fact, the Court declared that "[t]he character of the power exercised is not material." *Omnia*, 261 U.S. at 510, 43 S.Ct. 437. As *Omnia* recognized, this issue cuts both ways: "If, *under any power*, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable." *Id.* (first emphasis added).

Contrary to the implications of plaintiffs' argument, exercise of governmental power pursuant to national security concerns or those of foreign policy does not immunize those governmental actions from judicial review. The Government is bound by the protections afforded in the Takings Clause of the Fifth Amendment, both when the government action implicates the exercise of power over national security or foreign policy and when the government action represents another exercise of sovereign power. *Omnia* establishes that whether a taking has occurred in these circumstances depends, not on the character of the governmental power exercised, but on whether the governmental

action actually regulates an individual's cognizable property right so as to appropriate it for public use without the payment of just compensation. *See Colvin Cattle*, 468 F.3d at 808 (holding that loss in value to property interest is not taking when such loss in value was not result of regulations upon that property interest, but, instead, over interest in which plaintiff could claim no property stake).

Even if the court were to proceed on the assumption that plaintiffs' licenses constitute property interests, plaintiffs have failed to allege that the Government's designation of the Palmyra National Wildlife Refuge and closure of the refuge to commercial fishing directly regulated operations under those licenses. The designation and closure of the refuge frustrated plaintiffs' business expectations pursuant to their licenses and, no doubt, operated to the severe financial detriment of plaintiffs. Yet, plaintiffs have not asserted a cognizable property interest subject to the government action sufficient to support a takings claim under the Fifth Amendment. Plaintiffs have not shown, and cannot show, any facts that, accepted as true, entitle them to the relief sought, and therefore no claim is stated upon which relief can be granted.

Appendix B

CONCLUSION

Accordingly, based on the foregoing, defendant's motion to dismiss is granted, and the Clerk of the Court shall enter judgment pursuant to RCFC 12(b)(6) dismissing the complaint.

IT IS SO ORDERED.

No costs.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 29, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5058

PALMYRA PACIFIC SEAFOODS, L.L.C., PALMYRA PACIFIC ENTERPRISES, L.L.C., PPE LIMITED PARTNERSHIP, and FRANK SORBA,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-035, Judge Christine O.C. Miller.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

Appendix C

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 6, 2009.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 09/29/2009

(2)

No. 09-766

In the Supreme Court of the United States

PALMYRA PACIFIC SEAFOODS, L.L.C., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the trial court's dismissal of petitioners' takings claims because the government's establishment of a National Wildlife Refuge and regulation of commercial fishing in the sovereign waters surrounding the Palmyra Atoll did not take petitioners' private contract rights to establish a commercial fishing operation on the atoll itself.

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In the Supreme Court of the United States

No. 09-766

PALMYRA PACIFIC SEAFOODS, L.L.C., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 561 F.3d 1361. The opinion of the Court of Federal Claims (Pet. App. 23a-46a) is reported at 80 Fed. Cl. 228.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2009. A petition for rehearing was denied on September 29, 2009 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on December 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Palmyra Atoll is a United States territory located approximately 1000 miles south of Hawaii. Pet. App. 24a. The territorial sea (the water immediately adjacent to the coast) and the submerged lands underneath those waters are held by the United States as a fundamental aspect of its sovereignty. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981); *United States* v. *California*, 332 U.S. 19, 34-35, 38 (1947). The atoll is surrounded by a 200-mile Exclusive Economic Zone (EEZ) over which the United States has sovereignty. Pet. App. 24a. An exclusive economic zone is an area in which a nation has special rights over the exploration and use of marine resources, and it typically extends 200 nautical miles beyond the territorial sea. See *Black's Law Dictionary* 647, 1729 (9th ed. 2009). The United States has the authority to manage natural resources, including the power to regulate fishing, within the EEZ. Pet. App. 24a; see Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) (establishing the EEZ and asserting United States' sovereignty over the EEZ).

During World War II, President Franklin D. Roosevelt issued an Executive Order establishing a Naval Defensive Sea Area and Naval Airspace Reservation over the territorial waters from the high-water mark out to a three-mile boundary surrounding the Palmyra Atoll. Pet. App. 24a; see Exec. Order No. 8682, 6 Fed. Reg. 1015 (1941), discontinued by Exec. Order No. 9881, 12 Fed. Reg. 5325 (1947). During the war, the United States established a naval base on the Palmyra Atoll, including an airstrip, dock, harbor, and base camp. Pet. App. 24a. After the war, the United States sued to quiet title to the Palmyra Atoll. This Court determined in that suit that the Fullard-Leo family had obtained fee

simple title to the majority of the emergent land of the atoll through a series of conveyances that began with a grant from the Kingdom of Hawaii. See *United States* v. *Fullard-Leo*, 331 U.S. 256, 265-281 (1947).

Through a series of licenses, sublicenses, and consents (collectively referred to here as the Palmyra Licenses), the Fullard-Leo family conveyed to petitioners the exclusive right to establish a commercial fishing operation on the Palmyra Atoll, including the right to use the emergent land of the atoll "for commercial fishing and related transport and support operations," and the right to use the airstrip, dock, harbor, and base camp. Pet. App. 2a-3a; C.A. App. A200081, A200250-A200261. The Fullard-Leo family later sold part of the emergent land of the atoll to The Nature Conservancy, subject to the Palmyra Licenses. Pet. App. 25a.

In January 2001, pursuant to the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd(a), the Secretary of the Interior established the Palmyra Atoll National Wildlife Refuge. Pet. App. 4a; see C.A. App. A200107-A200109 (Secretarial Order 3224). The Refuge was established "to protect and preserve the natural character of fish, wildlife, plants, coral reef communities and other resources associated with the tidal lands, submerged lands, and waters of Palmyra." *Id.* at A200107. The Refuge consists of the Palmyra Atoll's tidal lands, submerged lands, and waters out to 12 nautical miles; that area comprises less than five percent of the EEZ. Pet. App. 4a; see C.A. App. A200107-A200109.

The Department of the Interior published a regulation closing the Refuge to commercial fishing. Pet. App. 4a; see 66 Fed. Reg. 7660-7661 (2001). The regulation states that the government will "close the refuge to com-

mercial fishing but will permit a low level of compatible recreational fishing for bonefishing and deep water sportfishing under programs that [the government] will carefully manage to ensure compatibility with refuge purposes." Pet. App. 4a (quoting regulation). The Nature Conservancy then conveyed approximately 444 acres of emergent land of the Palmyra Atoll to the United States for addition to the Refuge, subject to the Palmyra Licenses. *Id.* at 4a-5a; see C.A. App. A200148-A200165, A200167-A200174.

2. Petitioners sued the United States in the Court of Federal Claims (CFC), alleging that the designation of the National Wildlife Refuge and the accompanying Department of the Interior regulation effected a taking of their property without just compensation in violation of the Just Compensation Clause of the Fifth Amendment. Pet. App. 4a-5a; see C.A. App. A200001-A200012 (complaint). Petitioners contended that the United States had "directly confiscated, taken, and rendered wholly and completely worthless" their property interests, as "embodied and reflected" in the Palmyra Licenses. Pet. App. 4a-5a (quoting C.A. App. A200007 (¶ 37)). Petitioners alleged both that the government had effected a "categorical taking" of their property by "taking and rendering worthless [their] rights under the Palmyra License[s]," C.A. App. A200009 (¶ 46-47), and that the government had effected a "regulatory taking" by "den[ying] [petitioners] any and all economically viable use of the Palmyra License[s]," *id.* at A200010 (¶ 51). The government moved to dismiss petitioners' complaint, or, in the alternative, for summary judgment. Pet. App. 5a.

3. The CFC granted the government's motion to dismiss petitioners' complaint. Pet. App. 23a-45a. The

court applied a two-part test, asking (a) whether petitioners had established a property interest for purposes of the Fifth Amendment, and (b) whether the governmental action at issue amounted to a compensable taking of that property. *Id.* at 29a-30a. The court found that petitioners had asserted a property interest in a series of licenses that permit them to conduct commercial fishing operations on the emergent land of the Palmyra Atoll. *Id.* at 30a-31a. The court further explained that the crucial question was not whether petitioners possessed any property interest, but whether their asserted property interests "actually w[ere] the subject of the alleged taking." *Id.* at 33a.

The CFC concluded that the government's establishment of the Refuge and closure of the Refuge to commercial fishing did not take petitioners' property. The court held that, even assuming petitioners' licenses were property rights that would be cognizable in a takings action, the licenses were not the subject of the relevant government action. Pet. App. 34a-45a. The court explained that the government had not appropriated or regulated petitioners' licenses; instead, it had regulated the tidal lands, submerged lands, and waters off the shore of the Palmyra Atoll, an area where petitioners conceded that they had no property rights. *Ibid.* Thus, the court explained, whether petitioners' "property interest in the licenses has lost value by virtue of the loss of commercial fishing access to the waters surrounding Palmyra is of no moment, because such loss in value was not occasioned by governmental restrictions on a constitutionally cognizable property interest possessed by [petitioners]." *Id.* at 35a.

In so holding, the CFC relied on this Court's decision in *Omnia Commercial Co.* v. *United States*, 261 U.S.

502, 508-510 (1923). The Court in *Omnia* explained that, although the government's taking of contract rights (in that case, a contract to purchase steel) would be compensable, the government is not liable if it simply regulates the subject-matter of the contract (by, for example, requisitioning steel from the manufacturer) and that regulation has the effect of injuring another contracting party. Pet. App. 36a-37a. Here, the CFC explained, petitioners' only contractual right was to use the emergent land of the Palmyra Atoll to establish a commercial fishing operation; the Fuller-Leo family had no authority to grant petitioners any right to fish in the surrounding waters. *Id.* at 35a. The CFC concluded that because the government had not regulated petitioners' property rights, but instead had taken lawful action in an area over which it held sovereign authority, its actions did not effect a taking. *Id.* at 45a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court explained that a plaintiff in a takings action "must point to a protectable property interest that is asserted to be the subject of the taking." *Id.* at 6a. The court recognized that "contract rights can be the subject of a takings action." *Ibid.* It held, however, that the government's regulation of activities in its own waters did not take petitioners' contract rights to conduct operations on the emergent land of the Palmyra Atoll.

Relying on this Court's decisions in *Omnia* and in *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (1924), the court of appeals explained that the government generally "does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." Pet. App. 7a. The court explained that this Court in *Omnia* had distinguished

between a "claimed taking of the subject matter of a contract and the taking of the contract itself," and had held that the government does not take contract rights by acquiring or regulating the subject matter of the contract. *Id.* at 8a. On the other hand, the court of appeals explained, this Court had found a taking of contract rights in *Brooks-Scanlon*, *supra*, where a Presidential order had appropriated a contract to build a ship, and the government had "put itself in the shoes of [the] claimant and [taken] from [the] claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had." *Id.* at 8a-9a (quoting 265 U.S. at 120).

In this case, the court of appeals observed, petitioners had asserted a property right to conduct fishing operations on the land of the Palmyra Atoll. Pet. App. 10a. The court explained that "[t]he problem with that argument is that the Interior Department's regulation does not prohibit commercial fishing operations on Palmyra—it merely prohibits commercial fishing activity in the surrounding waters." *Ibid.* The court noted that petitioners had not asserted a right to fish in the waters around Palmyra, and that any such claim would fail as a matter of law. *Id.* at 10a n.1. The court determined that "[t]he fact that the government's regulation of activities in the waters surrounding Palmyra may have adversely affected the value of [petitioners'] contract rights to engage in activities on shore [was] not sufficient to constitute a compensable taking." *Id.* at 10a-11a.

The court of appeals also rejected petitioners' argument that the government had taken their property by allegedly "targeting" their contract rights. Pet. App. 17a-19a. The court explained that under *Omnia*, the crucial question was whether the government had di-

rectly appropriated or regulated petitioners' property. *Id.* at 17a. The court concluded that, because the government's regulation of activities in its own waters "regulated conduct as to which [petitioners] had no protectable property interest," that regulation "did not constitute a taking for which compensation had to be paid." *Id.* at 19a.

Finally, the court of appeals rejected petitioners' arguments that the government's regulation would interfere with their rights to use a pier on Palmyra and to traverse the Refuge to reach the open fishing waters beyond the Refuge. Pet. App. 19a-22a. The court determined that petitioners had waived any claim that they would be denied access to the pier, and that, in any event, "there is nothing on the face of the regulation that suggests any restriction on the use of the pier." *Id.* at 19a. With regard to the claimed impairment of petitioners' right to traverse the Refuge, the court noted that petitioners "ha[d] not spelled out the property interest underlying that assertion in any detail." *Id.* at 20a. The court further explained that, if petitioners' claimed interest was an easement of necessity, "[t]here is nothing in the regulation that by its terms restricts [petitioners'] right to cross the refuge to reach their base of operation on the island." *Id.* at 22a. The court therefore found "no occasion to decide whether [petitioners'] contract rights * * * carried with them the right of access to the island and whether a restriction on such access would have constituted a compensable taking." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 18-31) that the court of appeals erred in affirming the dismissal of their takings claim. The decision of the Federal Circuit is correct and

does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly affirmed the dismissal of petitioners' claims. The court assumed that petitioners' rights under the Palmyra Licenses could qualify as "property" within the meaning of the Just Compensation Clause. Pet. App. 6a. But as both the CFC and the court of appeals explained, the government's actions in this case cannot be said to have "taken" petitioners' rights under the contract because the government did not appropriate or regulate petitioners' property. *Id.* at 7a-12a, 34a-35a. Instead, the government regulated activities on its own waters, which it had the full authority to do.

As petitioners acknowledge (Pet. 1, 2, 3), the only alleged property right at issue is petitioners' contract right to conduct commercial fishing operations on the emergent land of the Palmyra Atoll. Petitioners do not assert that the Palmyra Licenses provided them with any right to engage in commercial fishing in the waters surrounding the atoll. Pet. App. 5a. Any such claim would fail because the United States has sovereign authority over the territorial sea and the EEZ. *Ibid.*; see p. 2, *supra*. Although the government's regulation of its own sovereign territory may affect the value of petitioners' contract rights, the government has neither appropriated those rights nor attempted to regulate petitioners' conduct on the land of the atoll. See Pet. App. 18a. Because the government "regulated conduct as to which [petitioners] had no protectable property interest," the courts below correctly dismissed petitioners' takings claim. *Id.* at 19a.

That conclusion follows from this Court's decisions in *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923), and *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (1924), which considered taking claims that were premised on contract rights. In *Omnia*, the government requisitioned all steel produced at a certain plant. A private company that had a pre-existing contract right to purchase steel from the plant argued that the government's requisition of the steel effected a taking of its property. This Court held that the plaintiff's property had not been taken because the government had not acquired the contractual obligation or the right to enforce it, but had simply regulated the subject-matter of the contract. 261 U.S. at 507-513. In *Brooks-Scanlon*, by contrast, the Court did find a taking because the government had requisitioned the contract for the construction of a ship and had thereby acted directly upon the property right at issue (the contract). 265 U.S. at 119-123.

Under those principles, no Fifth Amendment taking occurred in this case because the government acted to regulate an area over which it possessed exclusive authority and as to which petitioners did not possess any property right. Indeed, the relationship between the relevant government action and the plaintiffs' contract rights is considerably more attenuated here than in *Omnia*. In that case, the government requisitioned the very steel that the plaintiff had a contractual right to purchase, but the Court held that the plaintiff had suffered no Fifth Amendment deprivation because the government had not taken the contract itself. Here, by contrast, the government has not regulated the activity in which petitioners have a contractual right to engage (*i.e.*, the conduct of specified operations on the Palmyra

Atoll); it has simply made that contract right less valuable by banning commercial fishing in the surrounding waters. Dismissal of petitioners' takings claim therefore follows *a fortiori* from the decision in *Omnia*.

Petitioners suggest (Pet. 4) that the government has taken their property by denying them access to the pier and denying them the right to traverse the Refuge to reach the atoll. The court of appeals correctly rejected those claims. The court explained that petitioners had waived the claim regarding the pier by failing to assert it in the CFC. Pet. App. 19a. Indeed, petitioners asserted in the CFC that the government's regulations do not affect their activities on the "emergent lands or fixtures appurtenant thereto." *Ibid.* In any event, as the court of appeals explained, "nothing on the face of the regulation * * * suggests any restriction on the use of the pier." *Ibid.* The court of appeals likewise observed that nothing in the regulation limited petitioners' right to cross the Refuge, and that petitioners had not identified any action taken by the Department of the Interior that would have that effect. *Id.* at 21a-22a.

There was consequently no occasion for the courts below to consider whether government interference with access to the pier or travel through the Refuge to reach the atoll would have effected a compensable taking. And because petitioner does not take issue with the court of appeals' waiver holding or its analysis of the regulation, there is likewise no need for this Court to address those questions.

2. Petitioners contend (Pet. 5-8, 18-20) that this Court should grant review to decide whether private contracts are property protected by the Just Compensation Clause. The court of appeals agreed with petitioners, however, that "contract rights can be the subject of

a takings action," and it assumed that petitioners' own contract rights could be the basis for a takings claim. Pet. App. 6a-7a (citing *Lynch* v. *United States*, 292 U.S. 571, 579 (1934), and *United States* v. *Petty Motor Co.*, 327 U.S. 372, 381 (1946)). The court rejected petitioners' takings claim because the government had not appropriated petitioners' contract rights but had simply engaged in lawful regulation of its own property. The government's brief in the court of appeals likewise agreed that contract rights may be considered "property" within the meaning of the Just Compensation Clause. Gov't C.A. Br. 14; see Gov't Resp. to Pet. for Reh'g 8. Because there is no dispute on this question, and because petitioners acknowledge (Pet. 6) that the court of appeals decided the issue in their favor, this Court's review is not warranted.

In any event, petitioner is mistaken in contending (Pet. 5-8, 18-20) that there is disagreement among the circuits on this question. As petitioners note (Pet. 5), this Court has stated that valid contracts are property within the meaning of the Fifth Amendment. See, *e.g.*, *Lynch*, 292 U.S. at 579; *Omnia*, 261 U.S. at 509. In *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986), the Court again recognized that contracts may be "property" for purposes of the Just Compensation Clause, while also holding that not all regulation of contract rights effects a compensable taking.

The courts of appeals have faithfully applied this Court's holdings. Contrary to petitioners' contention (Pet. 5-8), the Seventh Circuit has not held that contracts cannot qualify as property for purposes of the Just Compensation Clause. In *Pro-Eco, Inc.* v. *Board of Comm'rs*, 57 F.3d 505, cert. denied, 516 U.S. 1028 (1995), the case on which petitioners principally rely in assert-

ing a circuit conflict, the Seventh Circuit acknowledged this Court's statements that contract rights can constitute compensable property interests. See *id.* at 510. The court simply concluded that, because "options to buy real estate do not create property rights in real estate" under Indiana law, the plaintiffs' option to purchase land in Indiana was "not a property interest protected by the Takings Clause." *Id.* at 509-511. Similarly, in *Peick* v. *Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983), cert. denied, 467 U.S. 1259 (1984), the court did not hold that contract rights are never "property" for takings purposes. Rather, it held that the alleged contract right at issue—the "right" to avoid liability imposed by government regulation—was not a "legally enforceable and recognizable interest in distinct property." *Id.* at 1275-1276. And petitioners acknowledge (Pet. 6-7) that the language regarding whether contract rights are "property" in *Pittman* v. *Chicago Board of Education*, 64 F.3d 1098 (7th Cir. 1995), cert. denied, 517 U.S. 1243 (1996), is *dicta*, because (as the court of appeals explained) the right to tenure at issue there arose from a statute rather than a contract. *Id.* at 1104.

Similarly, petitioners are mistaken in contending (Pet. 7) that the decision below conflicts with the Sixth Circuit's decision in *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d 894, cert. denied, 498 U.S. 895 (1990). In *Cavazos*, the court of appeals did not adopt a categorical rule against treatment of contracts as property for takings purposes. Instead, applying this Court's precedents, the court held that Congress's modification of a statute concerning federal reimbursement of state agencies for student loan defaults did "not breach any 'contract'" between the federal government and the state

agency. *Id.* at 900. Rather, the court viewed the agreements between the state and federal governments as simply a "codification of the cooperative relationship between the federal and state agencies" that did "not generate property rights under the takings clause." *Id.* at 901. The Second Circuit's decision in *Buffalo Teachers Federation* v. *Tobe*, 464 F.3d 362 (2006), cert. denied, 550 U.S. 918 (2007), likewise does not establish a circuit conflict. As petitioners recognize (Pet. 7-8), the court in that case assumed that contracts before it *were* property for takings purposes. See *Tobe*, 464 F.3d at 375.

3. Petitioners also contend (Pet. 8-14, 21-25) that this Court should grant review to determine whether regulatory-takings principles apply to contract rights. This case would present a poor vehicle to consider that question. Contrary to petitioners' contention (Pet. 12), the court of appeals did not "reject[] any possibility that a regulatory taking of a private contract could occur." Instead, the court of appeals determined that no taking occurred in this case because the government did not appropriate or directly regulate petitioners' property. Pet. App. 8a-9a, 13a. Because the court of appeals concluded that the government had only "regulated conduct as to which [petitioners] had no protectable property interest," *id.* at 19a, it had no occasion to consider whether the regulation imposed sufficiently severe burdens to qualify as a taking.*

* None of the cases cited by petitioners suggest that a regulatory-takings analysis should be conducted in the absence of any direct interference with contract rights. As petitioners acknowledge (Pet. 13), *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412, 414-419 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001), and *Vesta Fire Insurance Corp.* v. *Florida*, 141 F.3d 1427, 1429-1434 (11th Cir. 1998), both involved regulation that directly altered contractual rights. In

Petitioners contend (Pet. 11-12) that the court of appeals implicitly rejected a regulatory-takings theory because the court did not use the term "regulatory taking" in its opinion or conduct the fact-specific analysis set out in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The court had no occasion to apply regulatory-takings principles, however, because petitioners did not satisfy the threshold requirement of identifying a "direct restraint on any property interest held by [petitioners]." Pet. App. 13a. Because petitioners did not show that the government was regulating their property (as opposed to the government's own waters), the court did not need to consider whether the *extent* of the regulation was sufficiently severe to constitute a taking.

In their court of appeals briefs and rehearing petition, petitioners did not distinguish between appropriations and regulatory takings, and they did not ask the court to conduct a *Penn Central* analysis. Instead, they simply alleged that the government had "nullif[ied]" their contract by regulating activities in its own waters, without specifying whether that action effected an appropriation or a regulatory taking. Pet. C.A. Br. 14-15. This Court ordinarily does not consider issues that were not pressed or passed upon below. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is one of "review, not of first view"); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not

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Holliday Amusement Co. v. *South Carolina*, 493 F.3d 404 (4th Cir. 2007), the court of appeals determined that the gambling regulation at issue was a classic exercise of police power, and that "analysis under existing takings frameworks" was therefore "unnecessary." *Id.* at 410, 411 n.2.

decide questions not raised or litigated in the lower courts.").

Finally, the Federal Circuit *has* applied regulatory-takings analysis to contract rights. In *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003), the court conducted an extensive *Penn Central* analysis and concluded that property owners' contract rights to prepay their mortgages and exit low-income housing programs after 20 years had been taken by the government when Congress modified the terms of the contracts. *Id.* at 1336-1353; see Pet. App. 13a-15a (distinguishing *Cienega Gardens* on the ground that the government actually altered the contracts at issue there). Petitioners offer no sound basis for concluding that the court of appeals in this case departed *sub silentio* from established circuit precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PALMYRA PACIFIC SEAFOODS, L.L.C.;
PALMYRA PACIFIC ENTERPRISES, L.L.C.,
PPE LIMITED PARTNERSHIP;
AND FRANK SORBA

Petitioners,

v.

UNITED STATES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners respectfully make reference to the Rule 29.6 Statement included in our December 29, 2009 Petition for a Writ of Certiorari. That statement remains accurate and current in all respects.

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INTRODUCTION

The arguments in the Government's Opposition Brief — and reasoning of the Federal Circuit decision the Government seeks to keep this Court from reviewing — treat contracts as a lesser form of property, to which the full protection of the Fifth Amendment's Takings Clause does not apply.

Principally, the Government argues that the Court need not concern itself with this case because, in the Government's view, the Government affected PPS's contract indirectly rather than directly. Even if that were true (and it is not), this Court's regulatory-takings decisions establish that the Takings Clause protects other forms of property against the indirect effects of Government action. Thus, unless a special takings doctrine applies to property that happens to be in the form of a contract, the Government's position conflicts with precedent.

The basic issue presented in this case, therefore, is whether contracts are entitled to the same, modern Takings Clause protection — including protection against the sort of non-appropriative regulatory takings that the Government worked on PPS's contract — as other forms of property. That issue underpins both of the Questions Presented set forth in our Petition. Those questions are timely and of great national importance, and this Court should grant the Petition so that it can resolve them.

I. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR THE EXPOSITION OF REGULATORY TAKINGS DOCTRINE AS IT APPLIES TO CONTRACTS

The Government asserts that "[t]his case would present a poor vehicle" "to determine "whether regulatory-takings principles apply to contracts." Opp. Br. 14. As support, the Government claims that regulatory takings doctrine — indeed, *all* takings doctrine — is inapplicable here because the Government frustrated PPS's contract rights without acting against them "directly." *Id.* *See also id.* at 9, 10, 15.

The Government's premise that it acted only indirectly against PPS's contract is incorrect. PPS showed — without the benefit of any discovery — that the Government acted directly. Government agents, "upset" that PPS held the contractual right to establish a commercial fishing base on Palmyra, sought to "beat up" on PPS. Pet. App. 40a. In short order, the same department of the Government propounded regulations that made it impossible for PPS to exercise its contractual rights meaningfully. *See id.* at 4a. The Government acted with the purpose of negating PPS's contract, and the Government's acts had precisely the intended effect. That is about as "direct" as Government action can get.

Regardless, even if we credit the Government's argument that it acted only indirectly against PPS's contract, the Government's conclusion that no takings liability can attach does not follow.

A. The Government is Not Automatically Immune From Takings Liability Where Its Actions Cause Harm Indirectly

This Court has repeatedly held that where the property interest underlying a takings claim is land, indirect effects of Government action can so severely impair the owner's use of the property as to effect a compensable taking.

For example, in *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), the Government dammed the Mississippi River, which flowed at its closest point more than a mile from plaintiff's property. The dam had the direct effect of raising the level of the Mississippi to its ordinary high-water mark and continuously maintaining it there. Raising the river level had the indirect effect of raising the level of a tributary, Dardenne Creek, that abutted plaintiffs' farmland. In turn, raising the level of the creek had the second-order indirect effect of "rais[ing] the water table and soak[ing] [plaintiff's] land sufficiently to destroy its agricultural value," *without* submerging the surface. *Id.* at 810 & n.5. While acknowledging that "[t]he plaintiff still owns its land," *id.* at 804 n.4, the Court held that "the resulting destruction of the agricultural value of the land affected, without actually overflowing it, is a taking of private property within the meaning of the Fifth Amendment." *Id.* at 801.

Similarly, in *United States v. Causby*, 328 U.S. 256 (1946), the Court held that frequent, low-altitude military flights within the federal air

servitude above plaintiff's farm so deleteriously affected the land as to effect a compensable taking. There, as here, the Government argued that any effect was incidental, consequential, and indirect, and therefore not cognizable as a taking: "The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation." *Id.* at 260. The Court rejected that position and held that a compensable taking had occurred. *Id.* at 267. *See also Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (Government firing artillery rounds over but not onto plaintiff's land could constitute a taking).

To the extent it might be argued that *Causby* and *Portsmouth Harbor* involved direct rather than indirect effects because the planes and shells at issue passed directly above the plaintiffs' land, the lower courts have not adopted such a narrow interpretation. Indeed, none other than the Federal Circuit has held that "nothing in *Causby* or the intervening precedent limits a takings claim" involving military aircraft noise and vibration to flights passing directly over the subject land. *Argent v. United States*, 124 F.3d 1277, 1282 (Fed. Cir. 1997). In that case, the Government again asserted the direct/indirect distinction, but was rebuffed:

> [T]he Argents allege[d] that the rearward blast of the jets as the Navy planes corner destroys their enjoyment

> of their property *even when the aircraft do not fly directly over their land.* According to the Government, however, the Argent's cannot base their claim on all the United States' flights around [the relevant base], but must base their claim *solely on those flights passing directly overhead.*

Id. (emphasis added). The Court of Appeals rejected the Government's argument. "The Government ascribes to takings jurisprudence an inflexibility that does not exist. The United States may take private property not only by physical occupancy, but also by imposing such burdens upon the use of the property as to deprive the owner of the enjoyment of the land." *Id.* at 1283 (citation omitted).

Thus, where the underlying property is land, the Government can effect a taking indirectly. Moreover, this Court has also held that Government action that indirectly affects property *other than land* can support a takings claim.

For example, in *Armstrong v. United States*, 364 U.S. 40 (1960), the Court held that the Government effected a compensable taking of certain liens attached to partially built ships the Government had commissioned. The liens could be considered intangible property or they could be considered interests in personalty (the ships and some unused supplies), but they could not be considered interests in land.[1] The Government's direct action in taking

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[1] *See In re Jones*, 768 F.2d 923, 928 (7th Cir. 1985) (Posner, J.) ("While a lien is property, it is not real estate even if it is a lien on real estate. Rather, a lien is intangible personalty.").

possession of the ships had the indirect effect of rendering the liens worthless because sovereign immunity would preclude any action to enforce them.

The Court nevertheless held that the Government's action effected a compensable taking of the liens. As the Court explained:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something the Government could do because its property was not subject to suit, but which no private [party] could have done.

Id. at 48.

Thus, the Court has held that the indirect effects of Government action can so severely affect an owner's use of land and personalty — property other than contracts — as to effect a compensable taking.

Accordingly, the Government's argument here — that the purportedly indirect nature of the effects of Government's action on PPS's contract bars PPS's

claim — depends on the application of a special takings doctrine that would apply to contracts but not other forms of property.

B. The Government Also Is Not Automatically Immune from Takings Liability Where It Exercises Sovereign Power

In a slight variation on its indirect-effects theme, the Government also argues that PPS's claim is unworthy of the Court's attention because the Government's regulation addressed a subject over which the Government has sovereign authority, *i.e.*, activity in the waters of the United States. *See* Opp. Br. 9, 10.

It is true that the Government established the Palmyra National Wildlife Refuge in the ocean, not on land. And it is true that the Government has sovereign authority over the part of the sea in which the Refuge was established.

But it is *not* true that those facts doom PPS's claim. This Court's takings decisions demonstrate that the Government is not immune from takings liability merely because it acts in an area where it has sovereign authority.

For example, writing for the Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), Justice Rehnquist noted that "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172. Similarly, the Court noted in *Causby* that "the United States has complete and

exclusive national sovereignty in the airspace over this country," but held that the way the Government exercised its sovereignty in the air above plaintiffs property effected a taking. *Causby*, 328 U.S. at 260 (internal quotation marks and citation omitted). And in *Kansas City Life Ins.*, the Court acknowledged "the Government's paramount power over the bed of navigable streams," but held the Government liable for a taking that resulted from the Government's placement of a dam within the bed of just such a waterway. *Kansas City Life Ins.*, 339 U.S. at 807.

C. The Character of the Government's Action Against PPS Warrants this Court's Attention

There is no dispute that the Government did not appropriate PPS's contract. Thus, as we explained in our Petition, the tripartite regulatory-takings paradigm this Court established in *Penn Central* provides the proper framework for resolving this case. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Of the three *Penn Central* factors, the most important here is "the character of the government['s] action." *Id.* That factor is most relevant in this instance because the character of the actions the Government took against PPS — at least so far as we could determine based on the limited, pre-discovery record — was, frankly, sinister.

Admittedly "upset" about PPS's contractual right to establish a commercial fishing operation on a remote atoll where a powerful and politically favored

interest wished to establish a glitzy "ecotourism camp," the Government set out to "beat up" on PPS. Pet. App. 40a. The Government settled on a scheme that would negate PPS's contract, but without appropriating it or even so much as acknowledging it in the relevance regulations.

By the Government's lights, though, the character of the Government's action — its choice to "beat up" on PPS — is irrelevant here: No matter how devious the character of Government action that affects a private contract, an injured party like PPS has no recourse under the Takings Clause unless the Government appropriates or "directly" regulates the contract.

In our view, by contrast, the Court's takings jurisprudence is meant to promote "fairness and justice," *see Armstrong*, 364 U.S. at 49, through "essentially ad hoc, factual inquiries," applied flexibly to each case, *see Penn Central*, 438 U.S. at 124. Under such an approach, the character of the Government's actions toward PPS's contract must be considered, not ignored.

* * *

The Government's Opposition asks this Court to countenance different treatment of contracts from other property protected by the Takings Clause. Moreover, the Government's position that direct action can support a takings claim but indirect action cannot would preclude courts from considering the character of the Government's action where that action is most devious.

Those are the circumstances in which a takings remedy is most necessary. This case is a perfect vehicle for determining the extent to which the Takings Clause, and regulatory takings doctrine established thereunder, provides for one when the property at issue is a contract.

II. WE DID NOT WAIVE THE ARGUMENT THAT GOVERNMENT FRUSTRATION OF A PRIVATE CONTRACT CAN EFFECT A COMPENSABLE REGULATORY TAKING

The Government asserts that in the court of appeals, we "did not distinguish between appropriations and regulatory takings, and [we] did not ask the court to conduct a *Penn Central* analysis." Opp Br. 15.

In our Federal Circuit briefing, we cited to *Penn Central*, and implored the court to remand the case so that the trial court could conduct the "case-specific, fact-intensive inquiry" *Penn Central* mandates. *See* PPS Appeal Br. 16 & n.53. Our appellate briefing stressed the same issue presented in our Petition — whether the decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), precludes a takings claim where the character of the Government's action is to nullify a particular private contract by frustration. *See id.* at 26-41; PPS Appeal Reply Br. 13-19.

To be sure, our briefing in the Court of Appeals focused on the applicability of takings doctrine generally rather than on regulatory takings doctrine

specifically. But regulatory takings doctrine is obviously a lesser included element of takings doctrine, and our briefing unquestionably addressed a key element of regulatory takings analysis — the character of the Government's action against PPS's contract rights. We emphasized the importance of the "motivation" and "purpose" animating the Government, *see, e.g.*, Appeal Br. 18-25, and we argued that the "nature of the government's action here is crucial and dispositive." Appeal Reply Br. 14. Thus, we have raised no new issue in our Petition to this Court by noting that the Federal Circuit failed to apply *Penn Central* properly.

III. THE CIRCUIT SPLITS WE IDENTIFIED ARE REAL

The Government claims that the circuit splits we identified in our petition are illusory. Not so.

A. The Circuits Are Split on the Degree of Takings Protection to Be Afforded Contracts

The Government first claims that "there is [no] disagreement among the circuits on th[e] question" whether contracts are or are not property protected by the Takings Clause. Opp. Br. 11-12.

In describing the Seventh Circuit's decision in *Pro-Eco, Inc. v. Board of Comm'rs*, 57 F.3d 505 (7th Cir. 1995), though, the Government makes our point for us. As the Government notes, the Court of Appeals "concluded that, because 'options to buy real estate do not create property rights *in real estate*' under Indiana law, the plaintiffs' option to purchase

land in Indiana was 'not a property interest protected by the Takings Clause.'" Opp. Br. 13 (*citing Pro-Eco*, 57 F.3d at 509-11) (our emphasis). The Seventh Circuit's holding, therefore, is that a contract — the plaintiff's option to purchase land — is "not a property interest protected by the Takings Clause" because it is not an interest in "real estate." *See Pro-Eco*, 57 F.3d at 509-11. The Seventh Circuit could not have been more clear — interests in land are protected property, whereas purely contractual interests are not. As we noted in our Petition, this holding conflicts with that of other Courts of Appeals. Pet. 6-8.

The Government also asserts that "there is no dispute" between the parties here as to whether contracts are property protected by the Takings Clause. Opp. Br. 12. But as we have explained, the Government's arguments depend on treating contracts differently from other property for takings purposes. We disagree. Hence, despite the Government's protest, the issue is in dispute.

B. The Circuits Are Split on the Applicability of Regulatory Takings Doctrine to Contracts

The Government claims that no circuit split exists concerning the application of regulatory takings doctrine to contracts because "the Federal Circuit *has* applied regulatory-takings analysis to contract rights." Opp Br. 16 (Government's emphasis). To support that claim, the Government directs the Court to *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

Evidently, the Government and the Federal Circuit understand that decision differently. In its opinion here, the Federal Circuit distinguished *Cienega Gardens* because "[t]he 'distinct property interest' that was taken in *Cienega Gardens* was the developers' '*real property rights* to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years,'" *i.e.*, (at least in the court's eyes) *not* a contractual interest. Pet. App. 14a (emphasis added).

CONCLUSION

The Federal Circuit and the Government would excuse the Government from paying just compensation when it takes property in the form of contracts, so long as the Government cloaks its actions as negating contracts indirectly — *i.e.*, by frustration — rather than by appropriating the contracts or regulating them "directly."

With the benefit of such a rule, the Government would have every incentive to frustrate private contracts it deems undesirable out of existence. And as we demonstrated in our petition, the Government has recently given every indication that it finds many types of common private contracts undesirable.

In many — probably most — instances where Government action frustrates a private contract, the public and general "character of the government['s] action" will not support a takings claim. We accept that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in

the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

But in other, especially troubling, cases — like here, where "upset" Government agents schemed to "beat up" on PPS, then did so by frustrating PPS's valuable contract rights — the character of the Government's conduct is so specific and so sinister as to require a remedy.

Accordingly, we respectfully urge the Court to grant the Petition so that it can decide whether one is available.

Respectfully submitted,

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